

The Right of Publicity on the Internet

Cristina Fernandez

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THE RIGHT OF PUBLICITY ON THE INTERNET*

CRISTINA FERNANDEZ**

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* Editor's Note: English is not the author's first language, therefore, it was necessary for the editors to rewrite portions of this article in order to improve its readability. The Harvard Citator (16th Edition) was used to place the footnotes in their proper form.

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I. INTRODUCTION

The licensing of images of world-famous idols such as Marilyn Monroe, Groucho Marx, Humphrey Bogart, or James Dean is a buoyant industry in Hollywood. Even though most of these stars are dead, their images are still widely used. This is also true on the World Wide Web (hereinafter "Web" or "WWW") where authorized web sites of stars co-exist with rival unofficial web sites from their fans. A good example is American Legends¹ (hereinafter "AL") which runs a web site with information about a number of legendary figures, including James Dean.

AL is the defendant in a lawsuit² filed by Curtis Management Group³ (hereinafter "CMG"), a multimillion dollar company that acts as the agent for the estates of James Dean, Marylin Monroe, and Humphrey Bogart, among others. CMG represents the James Dean Foundation, a trust that claims an exclusive right of publicity over Dean and his image. In its lawsuit, CMG alleges that the web site is an unauthorized use of James Dean for commercial purposes. "Netizens"⁴ from all over the world can order a copy of Dean's biography through the web site. CMG,

1. See *American Legends* (visited Mar. 26, 1997) <<http://www.americanlegends.com>>.

2. *CMG Worldwide, Inc., v. American Legends et al.*, No. 49D109607 (Ind., Marion County, filed Jul. 17, 1996).

3. *Id.*

4. "Netizen" is defined as "[a] citizen of the internet. Netizens participate in some of the public discussions on Usenet, mailing lists, and/or IRC. Most netizens also maintain one or more web pages. In many ways the opposite of a lurker, but even netizens lurk sometimes." CYBERSPACE DICTIONARY (visited Mar. 26, 1997) <<http://www.edmweb.com/steve/cyberdict.html>>.

claiming to have the exclusive right of publicity over Dean's figure, charges AL with misappropriation, defamation, unfair competition, and conversion. "While the suit will no doubt take years to get to court, it surely will turn into a landmark case. . . Here's hoping we don't end up without any Dean on-line-no one wants a 'Rebel Without A Site.'"⁵

The right of publicity protects against the unauthorized use of a person's identity or persona in a way that is likely to cause harm to its commercial value. Technically, all individuals have a right of publicity, although for the most part, celebrities are the ones who invoke it. Thus, if an on-line form of communication — such as a web site or a newsgroup — uses a person's identity for commercial purposes, that person may be able to object.

An individual's right of publicity is not absolute. A person's identity may be used in some cases, even if ostensibly for commercial purposes. This exception is based on the right of free expression, as stated in the First Amendment to the United States Constitution.⁶ To determine whether the work is "privileged," under the First Amendment, the courts apply a balancing test to the specific facts and circumstances. In doing this, the courts weigh the competing interests of the individual's right of publicity against the benefits to society from news dissemination and free expression. News, political commentary, satire, and other communications of public interest enjoy this privileged status. This is why newspapers and magazines are able to publish photographs and other personal details without permission and without infringing upon rights of publicity.⁷

The question is whether the numerous web sites, newsgroups, chatrooms, listservs, and trivia about famous celebrities, will be granted First Amendment protection. The purpose of this article is to analyze how the right of publicity applies to the on-line world of web sites, newsgroups, and other interactive applications which use the name, likeness, or any part of a person's identity. The thesis of this article is that most of these uses are mainly informative, entertaining, and not commercial advertising, and thus should be protected under the First Amendment. Unless

5. *Showbiz on the Web. What's New, What's brewing.* YAHOO INTERNET LIFE, Oct., 1996 (visited Oct. 1996) <<http://www.zdnet.com/yil/content/mag/9610/showbiz9610.html>>[hereinafter *Showbiz*].

6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

7. *See generally*, ONLINE LAW 259-64 (Thomas J. Smedinghoff, ed. 1996).

the uses are blatant commercial exploitation, they should not be deemed infringements of the right of publicity. The countervailing right to free speech, which limits the right of publicity, is more relevant in a medium that constitutes the best realization ever of the First Amendment. The current law will cover the on-line situations, but it needs to be adapted in order to take into consideration the special nature of the Internet.

To support this thesis, Part I describes the uses of a celebrity's persona on the Internet. It provides an overview of the nature of this new medium by describing the characteristics of digital information in order to show how traditional conceptions like space, time, property, or speech are modified. This nature of the Internet, as an easy and accessible means of communication, makes it the best realization of the First Amendment.

Part II provides a historical overview of the right of publicity in the doctrine and in the courts up to the current state of legislation. It criticizes the main rationales used by the courts to justify this right as simplistic and unsound. It also argues, from a socio-cultural perspective, that the right of publicity accounts for the power of the celebrity to suppress unwanted speech. Part III analyzes the different uses of a celebrity's persona on the Internet, by using an analogy to the existing case law for uses in an off-line world. Part IV suggests, from a policy perspective, that much can be done to improve the current dispersed state of legislation. It argues that the legislation should be unified in a Federal Statute, parallel to copyright regulation, and limited in the number of protected uses of the public persona.

The article concludes by stating that the existing legal doctrine of the right of publicity can solve most of the legal issues that might arise on-line. This legal doctrine will work well for on-line cases, but as a matter of policy there is much that can be done to improve the current statutory and common law regulation. The right of publicity has been construed too inconsistently and too broadly. Its blanket restrictions prohibit uses, such as paraphernalia products, which are just symbolic speech that is being restricted by the celebrity's monopoly on her public image. In an on-line world, the right of publicity will often defer to the quasi-perfect realization of the right to free speech. For the most part, the Internet is just an ongoing conversation, where informational web sites, newsgroups, and the like, are no different than books or magazines. It is speech in a digital media, and as such, ought to exist in an open marketplace, with few permissible restrictions by the right of publicity. After all, the free market of ideas constitutes the ground from which so many celebrities emerge. Only those uses that implicate commercial advertising

or threats to performance values should be considered infringement of the right of publicity. Off-line law can solve most on-line issues if carefully adapted.

The trend started by some courts, to extend the scope of the right to the mere evocation of celebrity through even surrounding objects, is too far overreaching. Rather, the commercial value in a person's identity must be kept in perspective because this is what the right of publicity aims to promote. The digital age does bring numerous avenues for expression to those performances by non or less well-known artists. These are the ones who lack leverage when signing contracts and thus, they are the ones who need legislative or judicial protection based. Digital reproduction of an actor's movements, as intrinsic to a person as her face, will need to be covered by the right of publicity in order to prevent unauthorized 'recycling' through digital animation. In this way, the right of publicity will effectively protect those public figures and artists in a more even way and will not further the gap between the stars and the new talent.

II. OVERVIEW OF NET CULTURE

A. *Real Uses of the Public Persona on the Internet*

This section begins by showing different ways in which the image and persona of celebrities are being used on-line. Hollywood stars, musicians, models, politicians, athletes, and sports-teams have all jumped on the Internet. They can be found not only in web sites, but also in other forms of electronic communications such as; newsgroups, listservs, trivia-games, and chat-rooms.⁸ Many of these conferences and web sites have been set up, not by the celebrities themselves, but by their fans. "Web sites [are] where super-fans enshrine their priestly powers, displaying

8. For the purpose of this article, we will focus on newsgroups, listservs and web sites — including trivia games. The courts have identified six categories generally as the most common forms of communication:

- (1) one-to-one messaging (such as "e-mail"),
- (2) one-to-many messaging (such as "listserv"),
- (3) distributed message databases (such as "USENET newsgroups"),
- (4) real time communication (such as "Internet Relay Chat"),
- (5) real time remote computer utilization (such as "telnet"), and
- (6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (*i.e.*, pictures), and moving video images.

Am. Civ. Liberties Union, et al. v. Reno, 929 F.Supp. 824, 834 (E.D.Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

their bootlegged and autographed relics for the extended contemplation of other admirers.”⁹ The Net, this open and easy-to-access medium, has made it possible for everybody to express and communicate worldwide who their idols are. True fans learn celebrities’ biographies by heart — their works and lives— and they like to exchange views with others interested in the same figures. This is simply part of human psychology: when we have a passion for something, we talk to others about it and try to spread the word.

With a couple of pictures, clips, or sound files, these fans set up the coolest web sites. Are they making money? Most of them are not. Some talented fans write their own stories about their idols. They dig so deep that they know more facts than those already available in the public domain. And, what better way to offer these speech-products to the world than through a web-site? Or to go to the folks on the ‘alt.fan.’ with whom they talk every other day, and tell them that they have written the definitive life of James Dean. Other fans feel proud of their web sites and decide to make T-shirts with their home page stamped on them. They will probably not make a living from this, but they enjoy the fact that people from around the world are willing to wear their T-shirt and share a portion of our popular culture.

There is also the detail oriented fan who likes to know every second in the life of the rich and famous. Her next step is to organize those facts in a data-base, connect it to the Internet and offer some free trivia game. Other netizens will visit the site and play, try to set a record and maybe contribute some more data with new facts about the rich and famous. One instance of this is “[A Letterman fan] donz5@aol.com who maintains a massive database of ‘Letterman’ trivia. His mastery of ‘Letterman’ minutiae transforms him from marginal obsessive to authority figure.”¹⁰ Another way to accomplish this is through self-published mailing lists — like the ones on Matt Drudge or Robert Seidman — where all subscribers to the list receive the messages submitted to the list address.

Celebrities are watching. Their consultants tell them that the web is a good thing; it is the future and they ought to get there as soon as possible. It is possible that in the near future they will not be famous if they are not on the Net. Persuaded by the fact that every star wants to have

9. Nathaniel Wice, *Guest Column. In The Future. . . No One Will Be Famous Unless They're Famous Online*, YAHOO INTERNET LIFE, Oct., 1996 (visited Oct. 20 1996) <<http://www.zdnet.com/yil/content/mag/9610/guest9610.html>>.

10. *Id.*

control of her official site, People magazine, realizing the popularity of fan sites, began offering most searched celebrities. "(Brad Pitt, Pamela Anderson Lee, etc.) which owed much to the fan model"¹¹ claim their official sites as that of the magazine.

Other stars try to mingle with their fans in the newsgroups bearing their names. In these public forums, people talk with words, images, and sounds. It is a richer speech than that of the off-line variety, and it does not fade away because every message is archived under subject matter. The threads of discussion are generally publicly available to any user with an interest in the topic. The variety of these groups is endless.

"Lurk around the personality-oriented alt newsgroups and you will quickly learn that the quarter hour of fame Andy Warhol promised everyone is both an entitlement and a limit."¹² James "Kibo" Parry inspires his followers in alt.religion.kibology.¹³ And, there is Reiko Chiba, a Japanese idol singer, who lets her fans pick what outfit she should wear each day by posting their votes.¹⁴ "Just cruise the alt.fan hierarchy, where mini-cults bloom and wilt with more intensity than the pop charts. Nevertheless, more on-line celebrity is still fed by the off-line variety than vice versa. The extra "channels" of the Internet stoke our appetites for known personalities."¹⁵

On-line providers, like AOL, are leading the race by offering on-line public appearances by the stars, as part of scheduled cyber talk-shows. A memorable one was, Bridgette Hall's appearance on AOL.¹⁶ Her publicist instructed her to answer one of the thousands of messages received from her fans.¹⁷ To the surprise of the worldwide audience, Hall invited her admirer to a New York charity party.¹⁸ "[T]he real 'Entertainment Tonight' covered the story, leaving millions of TV viewers with the vague idea that AOL is a great place to pick up supermodels."¹⁹

Some big record houses are betting on a cyberspace audience and offer cybercast concerts on the Net.²⁰ Atlantic Records, for example, cybercasted a Hootie & the Blowfish concert from the Red Rock Arena in Colorado. The record house hoped that on-line fans would buy the

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Showbiz*, *supra* note 5.

group's second album, which was not doing well on off-line music charts.²¹

Other, more ingenious forms of exploiting the celebrity cult include "audio-graphs" or recorded announcements by the stars that can be purchased through a brand new web site.²² Another way is through the electronic greeting card that features video-audio clips of both film and television characters. The former, apparently works with the consent of the star, while the latter is led by the infotainment²³ giant, Turner, who probably owns all of the rights "of well-known personalities, such as Humphrey Bogart and James Dean. Download it again, Sam."²⁴

Some of the stars are already enjoying the fruits of their fans' labor. Sometimes the same celebrity is featured in dozens of web sites. This decentralized collective effort ultimately contributes to the potential earnings of the star, more than it hurts her popularity. Evidence of this phenomenon can be seen in the case of singer Tori Amos. This artist has already received three platinum albums, despite the fact that her records do not sail-up the singles charts.²⁵ No doubt, part of her success has come from the fact that more than seventy web sites have been launched by her fans. "In addition, clips of some of Amos's videos can be viewed on the Atlantic Records site for those of you who can't get enough of the Diva of Cyberspace".²⁶

But not all celebrities are that cybersavvy. Some get annoyed over the content, which they cannot control, in those already existing on-line forums. They opt for building their official web site and perhaps for 'cease and desist' letters to the unauthorized sites.

Steven Seagal is feeling 'under siege' these days. Seagal, who has a reputation for being tough. . .with what's subsequently written about him in the press, is said to be less than happy about the many sites featuring material on him and his movies. So he wants to take matters into his own hands [by] launching his own site-which he can control more closely.²⁷

21. *Id.*

22. *Showbiz on the Web. What's New, What's brewing*, YAHOO INTERNET LIFE, Sept., 1996 (visited Oct. 20, 1996) <<http://www.zdnet.com/yil/content/mag/9609/showbiz9609.html>>.

23. "Infotainment" refers to the convergence of informational media and entertainment on the web. Anne E. Huntington & Lisa Carlson, *WWWebsters Dictionary* (Oct. 10, 1997) <<http://www.m-w.com/dictionary>>.

24. *Id.*

25. *Showbiz*, *supra* note 5.

26. *Id.*

27. *Id.*

Another famous case is the class-action lawsuit brought by a group of models against the on-line service CompuServe. In this case, the models allege that the service invaded their privacy and was negligent for the misappropriation of their likeness, for commercial benefit, which is in violation of Section 3344 of the California Civil Code.²⁸ Apparently CompuServe misappropriated their images without consent for commercial use, by publishing their photographs in CompuServe's "Glamour Graphics" and "Graphics Corner" forums, and in its "California Girls" library.²⁹ The suit alleged that CompuServe and several other defendants obtained the photographs without permission, and made the images available to more than 4.7 million CompuServe subscribers worldwide.³⁰ The photos were allegedly included in areas of the service for which CompuServe controlled the content.³¹ The plaintiffs also claimed that the images had been downloaded, distributed, or reproduced by users throughout the world in posters, advertisements, and product packaging.³² The plaintiffs sought compensatory and punitive damages, attorneys fees and costs, and injunctive relief.³³

In some cases it is not the star, but a trust that polices on-line activities in order to maintain the good name of a deceased celebrity. The trust may start with threatening letters to the lay netizen, usually by a non-lawyer, claiming the exclusive right to the persona of the star, under something that is called, the "right of publicity." The trust urges the netizen to take down the site, newsgroup, or what have you. The netizen does not understand. She usually knows nothing about copyrights and does not know that the picture that she used was in the public domain. Thus, she will usually give in to the legal threats. The most famous example is a phenomenon started in the mid-70s by female 'Star Trek' fans who made up a homosexual romance between Captain Kirk and Lieutenant Spock.³⁴ They used poetry, drawings and pictures.³⁵ While the work was considered in the academia as "one of the most fascinating appropriations and manipulations of popular culture by women ever," copyright holders prompted several role-playing "multi-user dungeons"

28. *Louder v. CompuServe, Inc.*, No. BC153274 (Cal. Super. Ct., L.A. County, July 5, 1996).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Wice, *supra* note 9.

35. *Id.*

("MUDs"), based on science fiction novels to shut down in 1994 under the first wave of lawsuit threats.³⁶

Those who resist the legal threats get sued for infringement of copyright, right of publicity, trademark, unfair competition, or similar charges. The AL lawsuit is a good example of a completely wrong understanding of the web, the way it works, and the nature of the medium. This article will proceed charge by charge in order to show the unsoundness of the lawsuit.

CMG alleged misappropriation of rights of publicity because AL chose to write a biography on Dean, based on its own research.³⁷ CMG controls Dean's likeness and believed that Dean would not be happy with the book.³⁸ The meaning that AL gave to Dean's figure was not in CMG's line of thinking.³⁹ The interview that AL published about one of Dean's love-affairs was simply not CMG's truth.⁴⁰ On top of that, since AL had set up its on-line 'kiosk,' using pictures which are deemed to be copyright free, it had to pay CMG because it held the monopoly on Dean's image and the rest of his persona for commercial purposes.⁴¹

CMG then charged AL with conversion, which is redundant with the misappropriation of rights of publicity charge.⁴² The tort of misappropriation "recognizes that individuals. . . have enforceable proprietary rights in trade values they create and that invasion of these values occurs when an unauthorized person converts them for personal use and profit".⁴³

Another charge that was brought was that of unfair competition.⁴⁴ Presumably, AL was not only getting CMG's business of selling Dean's image, but had also dared to place a link to CMG's official Dean's web site.⁴⁵ CMG went on by alleging violations of the Lanham Act, trademark infringement, dilution, and infringement of trade dress. AL had

36. *Id.*

37. *CMG Worldwide*, No. 49D109607.

38. *Id.*

39. *Id.*

40. *Id.*

41. Defendants do not have now and never had permission from the proprietor of Dean's rights of publicity, and other associated rights, to commercially exploit his name, image, likeness, or any other aspect of Dean's right of publicity. Likewise, defendants do not now have and never had permission from CMG to use, feature or display the CMG mark in any manner whatsoever.

CMG Worldwide, Inc., No. 49D109607 at 4.

42. David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 685-86 (1981).

43. *Id.*, at 686.

44. *CMG Worldwide*, No. 49D109607.

45. *Id.*

used both the trade name 'CMG' and the logo as part of its HTML recommended links.⁴⁶ CMG incorrectly inferred that AL's intention was to create the misconception that CMG, the true source for many stars, was endorsing AL's site. "Defendants have misappropriated and infringed upon such distinctive trade dress and, in so doing have violated the Lanham Act. . . all for the purposes of furthering the sales of said book and the promotion of defendants' other commercial activities."⁴⁷ CMG erroneously believed that AL would increase the hits on its page by linking to CMG.⁴⁸ This claim was completely meritless considering the way that hypertext works. In addition, in this particular case CMG did not know that AL's site received a Microsoft award for 'site of the week,' and therefore, AL did not need extra help to attract more traffic to its site.

AL was lucky that it did not use frames⁴⁹ in its web site. Following CMG's rationale, it would have been more apparent to CMG that AL was trying to deceive the visitor to CMG's site, by linking AL's site to CMG's official site. The visitor would not even notice that she had exited AL's site, because the frames stay, wrapping every single page where the visitor chooses to go and the URL remains the same (in this case, <http://www.americanlegends.com>). CMG would have considered this use misleading and an infringement of its copyrighted content. It would amount to stealing CMG's work and presenting it as AL's.

This lawsuit shows a lack of understanding of the basic nature of the Web. The hyperlinks are the Web, which are the neurons of this nervous system that is the WWW. The HTTP is the protocol linkage mechanism, that lets users move around the hypertext of millions of documents. Every site has hyperlinks to information related to the site's topic, because this is the only way to make this medium navigational. To ignore these basic principles of the on-line medium will only lead to an erroneous interpretation of the law in cyberspace.

46. *Id.*

47. *Id.* at 3.

48. *Id.*

49. Frames are just a type of HTML command that divide up the screen in two or more windows. One is permanent, the frame itself, and the other is the window where the user is viewing the pages he chooses to go to. The function of the frame is to facilitate the visitor's navigation inside a web site, acting like a menu with all the options that stays by one side of the screen to let one choose his destination without the inconvenience of using back and forward arrows. A secondary use of frames is advertising. Their permanent future makes them an ideal spot to set ad banners without disrupting the infotainment in the main window.

B. The First Amendment on the Internet

Commentators⁵⁰ on cyberlaw generally agree that the Internet is the best realization ever of the First Amendment. It is close to the perfect market of ideas, where every speaker is a listener and vice versa. The natural characteristics of the medium make its access open to anybody. The result is a decentralized and democratic medium, where government censorship is more difficult than ever before.

"The Internet has no parallel in the history of human communication."⁵¹ It provides millions of people around the world with a low-cost method of conversing, publishing, and exchanging information on a vast range of subjects with a worldwide and virtually unlimited audience. The Internet is a "unique and wholly new medium of worldwide human communication."⁵²

The medium allows "literally tens of millions of people to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole."⁵³ As stated in the finding of facts in the *Reno* case, the first free speech case on the Internet to reach the Supreme Court, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought."⁵⁴

The Internet also provides new forms of community — communities based not necessarily on physical proximity, but on shared interests, beliefs, cultures, or personalities. In addition to its endless on-line content, the Internet hosts conversations and even "virtual communities" that

50. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995); Cyberspace cannot intrude without affirmative conduct by a user, so the Internet's ubiquitous character provides no justification for a departure from existing First Amendment rules. Indeed, since unfettered access to the Internet should provide its users with more meaningful access to the so-called 'marketplace of ideas' than has ever been the case with more conventional media, the case for robust First Amendment protection seems crystal clear.

See also, E. Walter Van Valkenbourg, *SYMPOSIUM: INNOVATION AND THE INFORMATION ENVIRONMENT: The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 324.

51. Brief of Appellees, Janet Reno, et. al., v. American Civil Liberties Union, et. al., (U.S. Oct., 1996) (No. 96-511).

52. *Id.* at ¶81.

53. *Id.* at ¶4.

54. *Id.* at ¶74.

simulate social interaction.”⁵⁵ These new forms of community enrich people’s lives and often are followed by face-to-face encounters.⁵⁶

The *Reno* court also found that “[t]he start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication.”⁵⁷ This fact permits the use of the internet by individuals as well as large corporations.⁵⁸ The Internet is peculiar because it is “not exclusively, or even primarily, a means of commercial communication.”⁵⁹ As Congress itself recognized, “[t]he Internet. . .offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁶⁰ Thus, the Internet is a “never-ending, worldwide conversation,”⁶¹ and as such, “[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails,” as Judge Dalzell observed.⁶²

In the words of Prof. Volokh,

“[T]he First Amendment of today will not only work well with the new information order — it will work better than it ever has before. . . The reason being that all the laws pertaining to speech are based on some premises on how the market of ideas should operate, sort of the ideal model to follow. The good news is that this model appears to be closer to the electronic medium ‘where money is no barrier to speaking; where it’s easy to avert eyes from offensive speech; where there’s more than one newspaper in each town, and something other than a vast wasteland on TV.’”⁶³

It is more likely that the new digital technology ideas will get their way, than the print or broadcast media.

Regulations that deal with speech, like libel law, indecency, or the right of publicity, will limit the Internet just as they limit the rest of the media. However, “there will need to be some ‘medium specific’ applications of these rules on the Internet.”⁶⁴ Take for instance the right of publicity. This common law right is a mere legal decision that gives more weight to the celebrity’s interest in her image as opposed to society’s free

55. *Id.*

56. HOWARD RHEINGHOLD, *VIRTUAL COMMUNITY* (1994).

57. *Reno, et. al.*, No. 96-511, at ¶76.

58. *Id.*

59. *Id.* at ¶75.

60. Communications Decency Act, 47 U.S.C. § 230(a)(3) (1996).

61. *Reno*, 929 F.Supp. at 883.

62. *Id.*

63. Volokh, *supra* note 50, at 1847.

64. Van Valkenbourg, *supra* note 50, at 324.

speech interest. In cyberspace though, the initial balance is already altered in favor of a stronger realized First Amendment. It should then logically follow that there is a weaker case for the publicity rights of individual celebrities, when considering their use on the Internet. Only blatant commercial uses should be deemed infringement, but for the rest of the gray area, entertainment or symbolic speech, where courts have been so hesitant and inconsistent, the scales should fall on society's side. The trend initiated by the most recent cases — like the *Vanna White* case in the 9th Circuit— is to construe a more expansive or amorphous right of publicity as a “one size fits all.”⁶⁵ In the end, this uncertainty of what can and cannot be published may silence speakers and thus result in a reduction of the breadth of diversity and information that is now available on the Internet.

C. Digital Media v. Mass Media

The discussion of the existence of a right of publicity is not merely legal. As we will see, mass communication and the entertainment industry have played a major role in the actual configuration of the right of publicity. The courts, aided by the doctrine, had to create a property right in order to protect celebrities' interests in their images from indiscriminate exploitation in the mass media. But, we are beginning to see a movement by a great part of society to a digital media which is more decentralized and more individualized than are television or radio. This change in the distribution channels of information may alter the value attached to a person's image, making it less influential in a more selective and dispersed audience. Consequently, innovative ways of protecting individuals' interests (other than in property) may be necessary as technology expands and our culture changes.⁶⁶

65. The California right of publicity can't possibly be limited to name and likeness. If it were, the majority reasons, a 'clever advertising strategist' could avoid using White's name or likeness but nevertheless remind people of her with impunity, 'effectively eviscerat[ing]' her rights. To prevent this 'evisceration,' the panel majority holds that the right of publicity must extend beyond name and likeness, to any 'appropriation' of White's 'identity'— anything that 'evoke[s]' her personality.

Vanna White v. Samsung, 989 F.2d 1512, 1514 (9th Cir. 1993) (Samsung used a robot dressed and posed like gameshow hostess Vanna White for an advertisement of VCRs. The court granted the mere evocation of identity to be an infringement of the right of publicity, despite the non-deceptive imitation and parody defenses.)

66. *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1714 (1983).

Visionary Derrick de Kerckhove,⁶⁷ disciple of media expert McLuhan, suggests some of the sociological consequences of this shift from mass-media to a digital media, like the Internet. His predictions can give us some light as to where the Internet is leading our society and the way in which it may alter our human interactions.

While radio and television are very powerful media, mainly because they are invisible technologies to the audience, the Internet is not invisible to users because it requires a proactive participation. Digital technology cannot impose its laws without overcoming some resistance from a social body. Radio and television are and have always been a single entity's agenda — a big man, a dictator, a powerful industry — whereas the agenda of the Web is a shared one, not imposed. The Web is both collective and individual at the same time. The Internet is the only medium where language appears orally and written down at the same time. Oral, because it is just-in-time or part of a context where communities reorganize according to need, function, and circumstance, like regular conversation. Written, because everything that is said is fixed and archived.

In a networked society, the power changes hands from the producer to the consumer. The importance of broadcast media diminishes and although broadcasters will continue, the number of alternative sources will multiply. The role of broadcast in a digital media is to feed our need for public references. However, the web allows us to move away from the mass-culture approach to a fast-speed, customized culture, and to the depth culture of the web. "Today, our identity is a point of being. Tomorrow, the self remains but identities multiply in just-in-time identities, fabricated ones, collective identities depending on where you are."⁶⁸

What all of this means for the current configuration of the right of publicity is that a very careful application to the on-line world is required, otherwise, we will reach unsound legal conclusions. The next example illustrates this point. The alt.fan. newsgroups are no more than public conversations, with a richer language because they may include pictures and sounds.⁶⁹ The right of publicity claims to protect the image and likeness of the celebrities from unauthorized uses. These ongoing conversations may carry different meanings than those intended in the first instance by the star. Moreover, since they are fixed and archived,

67. Kevin Kelly, *What Would McLuhan Say?*, WIRED 4.10 (Oct. 1996) (visited Oct. 30, 1996) <<http://www.wired.com/wired/4.10/features/dekerckhove.html>>.

68. *Id.*

69. See for example, David Futrelle, *Web of Gossip: The Internet is Creating Its Own Stars in the Realm of Dishing Dirt*, CHIC. TRIB., April 15, 1998, at 1.

text and pictures can be downloaded and reproduced easily. This new avenue of communication is viewed with resentment from the celebrity, the result being threatening letters that will force the newsgroup to shut off this Big Conversation,⁷⁰ without getting alternative ways of expression. The First Amendment has been abridged just as if a group of fans were forced to silence their weekly reunion. Both are conversations, carrying free speech, with the only difference that one uses air waves and the other, digital bits.

D. Digital Right of Publicity

Over the years, the courts have found it hard to recognize a right of publicity in the celebrity's persona. The reason being that the public image is not something that could be exclusively owned or controlled. The celebrities' public image results from a collective meaning. The public image is a shared base of immaterial information, so to speak. By creating a right of publicity over the commercial use of this information, the celebrity is given a limited monopoly. The non-commercial or informative uses remain outside the celebrity's monopolistic right.

Some authors, like JP Barlow, have noted that in a digital medium, the nature and value of information are altered somehow.⁷¹ Thus, they advocate a major change in the regulation of intellectual property, such as copyright.⁷² Given the intellectual nature of the right of publicity, and its characterization as information, it would be sensible to apply those same characteristics to the right when used in a digital medium. This process will teach something about the value of public images on-line. As Barlow and other authors point out:

1. "[I]nformation is obviously not a thing. Information is something that happens in the field of interaction between minds or objects or other pieces of information."⁷³ The name, the fame, or the public image of the celebrities is born through a collective meaning. It is through these interactions that the public persona of individuals is elevated from the mass of society.
2. "Information is experienced, not possessed. The central economic distinction between information and physical property is that information can be transferred without leaving the possession of the orig-

70. "Big Conversation" expresses the idea that the internet is a worldwide conversation and the most participatory medium of expression ever developed. *Reno*, No. 96-511.

71. John Perry Barlow, *The Economy Of Ideas*, WIRED 2.03 (visited Oct. 20, 1996) <<http://www.hotwired.com/wired/2.03/features/economy.ideas.html>>.

72. *Id.*

73. *Id.*

inal owner.”⁷⁴ The image of Madonna can be experienced or shared in many ways (movies, T-shirts, posters) by millions of fans around the world without the star losing her identity.

3. “Information wants to change. The stories which once shaped our sense of the world did not have authoritative versions. They adapted to each culture in which they found themselves being told.”⁷⁵ James Dean was the rebel without a cause for young generations in the fifties. Today, James Dean provides alt.lesbians newsgroup “with an icon which may embody a challenge to dominant understandings of the causal connections between biology, anatomy, desire, and sexual practice.”⁷⁶
4. “Information is perishable. Its quality degrades rapidly both over time and in distance from the source of production.”⁷⁷ The original performance, the live appearance, the original picture will be the most valuable pieces of information. From then on, subsequent reproductions will gradually lose value at a much faster rate.
5. “With physical goods, there is a direct correlation between scarcity and value. Familiarity is an important asset in the world of information.”⁷⁸ The right of publicity gives a monopoly to the celebrity. However, its on-line value is proportional to its dissemination, as opposed to its value increasing due to limited distribution. The decentralized character of the Internet makes it tougher for stars to maintain their same level of stardom, because they have to multiply their efforts. Andy Warhol’s fifteen minutes of fame will approximate to almost zero.
6. The conversation that goes on in the Internet about celebrities, is mainly a collective work that fills the archives, newsgroups, web sites, and databases of the Internet. It is “[i]nformation as its own reward.”⁷⁹

Celebrities will still be able to profit from this flow of information. Official sites, endorsements, live appearances, and real-time performances will constitute the fresh information coming from the living source. As J.P. Barlow puts it, “[i]t will be a matter of defining the ticket, the

74. *Id.*

75. *Id.*

76. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 143 (1993); citing Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

77. Kelly, *supra* note 67.

78. *Id.*

79. *Id.*

venue, the performer, and the identity of the ticket holder, definitions which I believe will take their forms from technology, not law. In most cases, the defining technology will be cryptography.⁸⁰ Thus, a property right, as configured today, might lose its relevance, as new ways (technology mainly) to protect the value attached to public figures arise.

The basic concepts from the physical world like time, space, speech, or information acquire new dimensions in the on-line world such as instantaneous and borderless communication where multimedia and bits are the key words. The solution then, to protect the celebrity's persona, may not be a property right, but may center on a technological advance. The problem is that some of this technology is coming, although it is not yet here. Lawmakers and courts need to envision where this whole industry is going. If not, they will come up with more and more restrictive laws like the CDA or decisions like the *Vanna White* case which will make it more difficult for a gradual transition to a more deregulated and technology-controlled medium.

III. OVERVIEW OF THE RIGHT OF PUBLICITY

This section explores the history of the right of publicity, the rationales given by the courts to justify the right, and the framework of the current regulations. The conclusion offers a sociological perspective of what this right ultimately means to popular culture.

The right of publicity is the right of each individual to control and profit from the value of his or her name, image, likeness, and other indicia of identity.⁸¹ For the most part, only celebrities generate significant economic value from this right. First, they receive an income through all of the demand for information on their lives and doings — news, gossip, biographies, interviews, docudramas. Second, paraphernalia such as T-shirts, posters, greeting cards, buttons, coffee mugs, etc., bearing the famous, has become very popular. Third, advertising of collateral products has become a very profitable activity. Brand names are willing to pay considerable amounts of money to celebrities because they will gain important returns.⁸² That is not the case in the sale of paraphernalia where the returns are marginal and where the economic rationale of the right of publicity for 'pay per view/use' is not yet clear.⁸³

80. *Id.*

81. See generally J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1992). But see Madow, *supra* note 76 (a thoughtful criticism of the right of publicity).

82. MCCARTHY, *supra* note 81, § 4.1 [D], at 4-8.

83. See generally note 157.

Courts have long protected the pecuniary value of a person's identity under a number of legal theories.⁸⁴ Legal order could assign all of these economic values to the same entity, either to the individual celebrity herself or to the public domain. A middle ground was adopted where the celebrity could get back, in a sort of monopoly, a part of the economic gains for some of the uses of her identity, but not all of them.⁸⁵ Thus, merchandising and advertising values that attach to star images have been construed as her private property and part of her right of publicity. But, a celebrity's persona may be freely appropriated for what are deemed to be primarily "informational" and "entertainment" purposes.⁸⁶ News reports, novels, plays, films, and biographies are all permitted uses, with neither authorization nor payment requirements in most cases.⁸⁷ Exceptions to this rule are the taking of a performance or the use of a look-alike/sound-alike.⁸⁸

Though the right of publicity is available to all individuals, right of publicity actions generally involve celebrities since there is little pecuniary gain in appropriating the name and likeness of an unknown individual. Doctrinally, the right of publicity has evolved from a type of privacy interest into a legal mixture of the tort of misappropriation, unfair competition law, and property jurisprudence.

A. *History of the Right*

The turn of the nineteenth century brought the image revolution with new techniques like photography. The press benefited profoundly from these changes. Advertising and journalism in general added pictures to the traditional text-only based publications. Famous people, who were known only by their names, saw their pictures distributed everywhere.⁸⁹ As a result, some felt that their privacy had been invaded and brought their cases to the courts. At about the same time this was occurring (1890), Warren and Brandeis wrote their article⁹⁰ in support for a legal right of privacy as defense, for a celebrity, against an unstoppable press.

84. See Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case For Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT LJ 223 (1994).

85. See generally note 157.

86. *Id.*

87. *Id.*

88. *Id.*

89. See Madow, *supra* note 76, for a detailed account of the history of the right of publicity.

90. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The right of privacy was first recognized in cases of unauthorized advertising of names and likeness. For example, the *Roberson* and *Pavesich*⁹¹ cases involved the interests in anonymity, autonomy, and reputation. The former, was brought by a minor whose picture had been used in an advertisement for flour.⁹² The latter involved the use of an artist's photo in a testimonial advertisement for life insurance.⁹³ This unauthorized commercial exploitation of one's name or likeness became widely recognized as part of the right of privacy.

Later, the technology evolution brought the radio and the movies. With them was born a new social phenomenon, the celebrity. Fame was more a question of attractive personality rather than merit. The power of this media made audiences lose their minds over these new stars. The press took advantage of this public interest and started to cover the private lives of the stars. It was the 20s and 30s, when Hollywood also discovered the lucrative business of exploiting the star's image through people's emulation and consumption of these idols.⁹⁴

During the 40s, celebrities gained leverage in negotiations which permitted them to recover control over their commercial exploitation.⁹⁵ During the next two decades, celebrities from the sports and entertainment industries managed the exploitation of their likenesses, which sometimes involved litigation in order to prevent unauthorized uses.⁹⁶ However, the lawsuits were brought under defamation, unfair competition, trademark infringement, or right of privacy claims.⁹⁷ Right of privacy claims were difficult to prevail on, since the courts reasoned that celebrities had entered the public eye voluntarily.⁹⁸ Even when they succeeded in their claims, the damage awards were nominal.⁹⁹ They usually were awarded offensive damages, but were not awarded commercial damages for misappropriation of their image.¹⁰⁰ Furthermore, the right of privacy was neither assignable nor descendible.¹⁰¹

91. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

92. *Roberson*, 64 N.E. 442.

93. *Pavesich*, 50 S.E. 68.

94. Madow, *supra* note 76, at 158-164.

95. *Id.* at 168-69.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

The only legal solution, in order to maximize this commercial value, was to create a property right in the celebrity's image. The celebrity would then be able to ban unauthorized uses of her image, authorize uses if paid for, and assign uses after death. This type of property recognition first came about in 1935 in the case of *Hanna Manufacturing Co v. Hillerich & Bradsbury Co.*¹⁰²

It was not until 1953 that the right was first named "right of publicity" by Judge Frank in *Haelen Laboratories Inc v Topps Chewing Gum, Inc.*¹⁰³ However, the Court did not categorize this right as property, and it did not offer any rationale for the new right. It simply recognized a preexisting commercial practice and admitted that without this right, celebrities could not get monetary compensation for their persona and thus "feel sorely deprived."¹⁰⁴

A year after *Haelan*, Melville Nimmer published an article on the right of publicity¹⁰⁵ which had a strong resonance, similar to that which Warren and Brandeis had on the right of privacy. Nimmer acknowledged the deficient protection of celebrities' commercial values through the existing legal theories.¹⁰⁶ He concluded that there needed to be a property-like right of publicity.¹⁰⁷ This right would be actionable for unauthorized use of one's persona, no matter whether it was offensive to the person.¹⁰⁸ The damages would be estimated in terms of the monetary value of the

102. *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F. 2d 763 (5th Cir.), *cert denied*, 296 U.S. 645 (1935). (Plaintiffs contracted with certain famous baseball players for the "exclusive right" to use their names, autographs, and photographs in connection with the sale and advertising of baseball bats. Plaintiffs then sued to enjoin a competing manufacturer from using the marks, based on property rights in the marks. Reversing the district court's decision, the court of appeals declared that "[f]ame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property." *Id.* at 766. Consequently, the Fifth Circuit held that plaintiff's contracts with the players operated only to prevent the players from objecting to its own use of their names.)

103. *Haelen Laboratories Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir.), *cert. denied*, 346 U.S. 816 (1953). (The defendant produced a baseball card bearing the photograph of a baseball player who had already granted the plaintiff an exclusive license to use his picture in connection with the sale of the plaintiff's products. Rejecting the defendant's argument that the agreement between the player and the plaintiff provided the plaintiff no enforceable rights, the Second Circuit held that New York's common law would recognize the baseball player's assignable "right in the publicity value of his photograph." The court coined "right of publicity" as the name of this right. In justifying recognition of the right of publicity, the Second Circuit rejected privacy notions and focused instead on the economic value of the public figure's identity.)

104. *Id.* at 868.

105. Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP PROBS. 203 (1954).

106. *Id.* at 214.

107. *Id.* at 216.

108. *Id.*

public figure, as opposed to the injury used in right of privacy claims.¹⁰⁹ However, the defendant could allege a public interest defense.¹¹⁰

In order to justify this new common law property right, Nimmer searched for a moral rationale based on Locke's theory of property.¹¹¹ He concluded that persons who have long and laboriously nurtured the fruit of publicity values, may be deprived of them unless judicial recognition is given to their publicity right. Madow suggests that this was part of a large campaign backed by Hollywood — Nimmer was legal counsel to Paramount, at this time.¹¹² The industry wanted to convince the mass audience that stardom is not a matter of luck, but is a matter of a celebrity's hard work and "labor."¹¹³ The fact is that after Nimmer's article, the right of publicity, was well accepted by the doctrine, but not that well by the courts. Later justifications, like the unjust enrichment rationale, by Prof. Kalven,¹¹⁴ or the copyright incentive rationale used by the Supreme Court in *Zacchini*,¹¹⁵ paved the way for a full recognition of the right.

Another landmark article was by Dean Prosser, in 1960, where he characterized the right of privacy as four different types of invasions. The fourth of which, appropriation of the plaintiff's name and likeness, grew into the right of publicity.¹¹⁶ The other three identified by Prosser were intrusion upon the plaintiff's solitude, public disclosure of private facts about the plaintiff, and publicity of information placing the plaintiff in a false light.¹¹⁷

109. *Id.*

110. *Id.*

111. Nimmer, *supra* note 105, at 216.

112. Madow, *supra* note 76, at 174, n.238.

113. *Id.*

114. Harry Kalvin, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 L. & CONT. PROB. 326, 331 (1966).

115. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (U.S. Ohio, 1977). (Hugo Zacchini made his living through performing as a "human cannonball." When Zacchini appeared at a county fair in Ohio, a television station's cameraman filmed his fifteen-second act of being shot out of a cannon. Zacchini sued on right of publicity grounds after the television station showed the film, accompanied by a reporter's favorable commentary, on its evening newscast. In a 5-4 decision, the Supreme Court reversed Ohio's highest court and held that the television station's showing of Zacchini's "entire act" could give rise to a valid right of publicity claim in his favor. The First Amendment defense had to give way to the performer's right of publicity.)

116. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

117. *Id.*

It was during the 70s and 80s when case law and statutes recognizing the right of publicity, blossomed.¹¹⁸ Madow explained that this growth in the number of these types of cases was because of the ever rising money involved in the claims brought to the courts by celebrities.¹¹⁹ There was a bigger legal pressure on the celebrity's side versus a less organized variety of infringers, with also less lawyering and lobbying skills.¹²⁰ The outcome is a quite incoherent jurisprudence that has gradually broadened the uses protected by the right of publicity and which varies from state to state.¹²¹ Infringing acts range from appropriation of name and likeness for use on fan-type merchandise, to the use of the image or a 'look-alike' to endorse collateral goods.¹²²

One of the most controversial decisions in the later years has been the *White v. Samsung* decision, handed down by the Ninth Circuit, in 1992.¹²³ Samsung used a robot dressed and posed like gameshow hostess Vanna White for an advertisement of VCRs. The court granted the mere evocation of identity to be an infringement of the right of publicity, with the sweeping effect of including even non deceptive imitations and parodies under the umbrella of the publicity right. This raised a First Amendment question as to the extent of this celebrity's monopoly.¹²⁴ Some argued that this outcome is the necessary response, by the law, to the threat that new media technologies pose to a celebrity's image.¹²⁵ This also constituted a strong countervailing interest to common free speech.

118. MCCARTHY, *supra* note 81, § 6.1[B]. According to McCarthy, the right of publicity has been recognized as a matter of common law in fourteen states, four of which have also statutory provisions that protect the right. Another group of nine states, including New York, have statutes that are denominated "privacy" statutes but are worded in such a way as to protect the economic interests of celebrities in certain aspects of their identities. In only two states, Nebraska and New York, the courts "expressly rejected the concept and held that a common law Right of Publicity does not exist."

119. *See generally*, Madow, *supra* note 76.

120. *Id.*

121. *Id.*

122. Weiler, *supra* note 84, at 224.

123. 989 F.2d 1512 (9th Cir. 1993).

124. The majority isn't, in fact, preventing the 'evisceration' of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law. It's replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her.

Id. at 1515.

125. J. Thomas McCarthy, *Is Vanna White Right and Judge Kozinski Wrong?*, 3 ENT. L. RPTR. 9 (1993); Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to*

If these new technologies facilitate the reproduction and distribution of image, sound, and what have you, then the scope of the traditional permitted use should grow proportionally as well. That is of course, unless the traditional intellectual property law will freeze and impair the faster pace and flexibility of these technologies.

Although the decision applies California law, it will undoubtedly have its influence in other circuits. However, as the Ninth Circuit Court of Appeals noted, California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment industry.¹²⁶ Meanwhile, because of *White*, other cases that involve creative ways of supposed misappropriation, are being brought to the courts.¹²⁷

B. State Legislation

In 1903, the state of New York, acting to reverse the Court of Appeals' decision in the famous *Roberson* case,¹²⁸ adopted a statute establishing both criminal and civil liability for the unauthorized use of, "the name, portrait or picture of any living person" for "advertising purposes, or for the purposes of trade."¹²⁹

This statute became the model for "name-and-likeness" statutes subsequently enacted in thirteen other states.¹³⁰ Today, several states have codified the right of publicity, and recognize an independent common-law right of publicity, while other states lack statutory protection yet recognize the publicity right at common law.¹³¹ To compound the confusion, those jurisdictions recognizing either a statutory or common-law right of publicity disagree as to the inheritability of the right.¹³²

the Dogs?, Sep. 1996 (Reprinted with permission of the L.A. DAILY JOURNAL) (visited Nov. 1996) <<http://www.gseis.ucla.edu/iclp/rftb.html>>.

126. *Sinatra v. National Enquirer, Inc.* 854 F.2d 1191, 1202 (9th Cir. 1988).

127. CMG Worldwide that manages the licensing rights to the champion thoroughbred racehorse Cigar, is suing an artist who sells lithographs and T-shirts which depict Cigar. Currently on appeal in California is a lawsuit brought by Fred Astaire's widow against Best Film & Video for using clips of Fred Astaire for an instructional dance video. Dennis Rodman has filed a complaint alleging, among other things, infringement of his right of publicity due to the production and distribution of long-sleeved jerseys bearing exact replicas of the actual tattoos located on his body.

Frackman & Bloomfield, *supra* note 125.

128. 64 N.E. 442 (N.Y. 1902).

129. 1903 N.Y. Laws §132 1-2, codified as amended at N.Y. Civ. Rights Law §§50-51 (McKinney 1988.)

130. MCCARTHY, *supra* note 81, § 6.1[B], at 6-6.

131. *Id.*

132. *Id.* at 6.1[B].

Fourteen states have adopted statutes which recognize a right of publicity, or a similar right under another name.¹³³ Most statutes were adopted during the 70s although Indiana has adopted its own more recently in 1994.¹³⁴ The California and New York statutes were the first state laws to codify the misappropriation of one's identity.¹³⁵ Both statutes are triggered when the likeness or name of a person is being used for "purposes of trade."¹³⁶ However, California's statutory right of publicity is broader than the New York one.¹³⁷

In New York, the right of publicity is covered by provisions of the Civil Rights Law and the New York General Business Law.¹³⁸ The New York Right of Privacy Statute provides for a civil cause of action, both in law and in equity. New York state courts do not recognize a common law right of publicity.

Section 3344 of the California code was adopted in 1972. It was amended in 1985, when California also enacted Civil Code § 990, which codified post-mortem publicity rights. Both § 3344 and § 990 protect the name, voice, signature, photograph, and likeness of human persons.

Generally, a person's right of publicity is also violated through the commercial use of look-a-likes or features which, when used in the proper context, identify the person. New York recently amended its right of privacy statute to make actionable the misappropriation of one's voice.¹³⁹ California and several other states recognize, by statute, a cause of action for infringement on the right of publicity through the unauthorized commercial use of voices, sound-alikes, or signatures.¹⁴⁰

At the federal level, there is no statute or common law for the right of publicity. However, the U.S. Copyright Act and the Lanham Act are often cited in right of publicity claims.¹⁴¹ The adoption of a uniform fed-

133. *Id.* § 6.2, at 6-10; See also Richard Raysman & Peter Brown, *Licensing Celebrity Rights of Publicity* (visited Dec., 1996) <<http://www.brownraysman.com/features.html>>.

134. MCCARTHY, *supra* note 81, at § 6.4A(A), at 6-49.

135. *Id.*

136. *Id.*

137. *Id.*

138. Civ. Rights L. §§ 50-51 ("Right of Privacy Statute") and by N.Y. Gen. Bus. L. § 397, cited in Raysman & Brown, *supra* note 133.

139. Raysman & Brown, *supra* note 133.

140. *Id.*

141. In particular, §§ 2(a) and 2(c) of the Lanham Act, 15 U.S.C. §§ 1052(a) and 1052(c), can provide a negative right to assert an interest in personal identity sufficient to prevent someone else from registering a trademark or service mark. The state claim of right of publicity infringement remains and can be asserted in federal court only under diversity jurisdiction or if pendent to a related federal claim. See Raysman & Brown, *supra* note 133.

eral right of publicity statute has been proposed by some scholars and legislative groups as a solution to the inconsistent and dispersed state laws.

Finally, the right of publicity has been recognized by the American Law Institute in its Restatement (Third) of Unfair Competition as the Appropriation of the Commercial Value of a Person's Identity.¹⁴² "The Right of Publicity. One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for [monetary and injunctive] relief."¹⁴³ With the inclusion of the right under the law of unfair competition, the commercial and property characteristics of the right are clearly acknowledged. The previous classification of the right of publicity as one of the four types of invasion of privacy on the Restatement of Torts created much of the confusion between the privacy and publicity rights.

C. *Historical Rationales for the Right*

Courts and commentators have identified three justifications for the right of publicity. First, is the moral right of a person to "reap the fruit of their labors," and a corollary concern with unjust enrichment.¹⁴⁴ Second, there are the economic arguments, with the most popular being the copyright-incentive theory that protecting the value of one's persona stimulates creative efforts.¹⁴⁵ Third, is the protection of the consumer from advertising deception.¹⁴⁶ Most of these rationales are controversial; while many of them prove to be wrong or, in the case of consumer deception, appear redundant when applied to appropriations of celebrity identity. Why this simplicity on the part of the judicial decisions? According to Prof. Grady, "[i]n most cases in which these theories are recited, it seems doubtful that even the judges take them very seriously, but many judges include them probably out of deference to the Realist tradition, which requires an explicit consideration of 'public policy' in practically every case."¹⁴⁷

142. RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION 46 (1995).

143. *Id.*

144. Madow, *supra* note 76, at 179.

145. *Id.* at 205.

146. *Id.* at 228; Weiler, *supra* note 84, at 240; *But compare*, J. Thomas McCarthy, *Melville B. Nimmer and The Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703 (1987).

147. Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 107 (1994).

1. Moral Arguments

The moral argument dates back to Melville Nimmer's 1954 article, "The Right of Publicity."¹⁴⁸ He based his theory on a principle of Anglo-American jurisprudence; "that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."¹⁴⁹ Numerous courts have used the same justification, rephrasing it as the right to "reap the fruits of their labors" and the right to control what one has created or the injustice of permitting others to "reap where they have not sown."¹⁵⁰

The theory, apart from being too simple, presents major flaws. It is evident that fame is not always the result of hard work, actually it may be the result of luck, public image, or mere scandal. More important is the fact that fame is not achieved without the aid of mass-media, and the consequent participation of the public in the image making of a star. The celebrity's labor by itself is not enough. It is a collective social phenomenon where we as audience recreate the ideas, information, and personalities that are transmitted to us by the infotainment media.

Today, courts use a more plausible argument which is based upon the moral offense to a celebrity's dignity when their likeness or name is associated with products without their consent.¹⁵¹ However, there is a flaw in this moral rationale for the right of publicity. The harm the courts are considering is not so much to the commercial value of the celebrity, but to celebrity's interest in not falsely endorsing or being placed in a false light.¹⁵² Thus, the current law of false advertising, defamation, and privacy would apply, offsetting the need for a separate right of publicity.

The moral rationale can also be formulated as an unjust enrichment argument. More precisely, the infringer who, with no authorization appropriates the celebrity's persona "reaps where another has sown."

148. Nimmer, *supra* note 105.

149. *Id.* at 216.

150. Madow, *supra* note 76, at 178.

151. *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 878 (S.D. N.Y. 1973); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) (in both cases the celebrity had taken a public position against the commercial exploitation of their publicity rights. The court held in both cases that the mere use of a celebrity's identity caused embarrassment for which mental distress damages would be available).

152. [T]he right of publicity allows celebrities to avoid the emotional distress caused by unwanted commercial use of their identities. Publicity rights, however, are meant to protect against the loss of financial gain, not mental anguish. . . . Laws preventing unfair competition, such as the Lanham Act, and laws prohibiting the intentional infliction of emotional distress adequately cover that ground.

Cardtoons, 95 F.3d 975.

However, the theory does not satisfy some cases of sound-alikes or look-alikes of a celebrity who has expended much labor into her image, but in which the courts have not recognized a right.¹⁵³ Second, the law tolerates commercial free-riding.¹⁵⁴ The celebrity may have done some free-riding herself, using the earlier labors of others to fabricate a distinctive persona.

The challenge comes in finding where the state should draw the line between actionable appropriation and non-actionable imitation. While the livelihood of an author is an important justification for some intellectual property law, stars' livelihoods do not obviously rest on T-shirts or posters, but on their primary career activities. Also, most of these unauthorized commercial appropriators often add some talent of their own, which also contributes to the common image making process.¹⁵⁵

2. Economic Rationale

The second justification offered for the right of publicity is that protection of the economic value of the celebrity's identity, like copyright and patent laws, encourages the celebrity to create performances that enrich common culture. This was first stated in the case of *Zacchini v.*

153. See *Shaw v. Time-Life Records*, 38 N.Y.2d 201 (1975) (The NY Courts of Appeals refused to create a private property right over Artie Shaw's swing music. The Court would protect the plaintiff from defendant's passing off his phone records as Artie Shaw's, but not from the defendant's mere appropriation of the Artie Shaw swing type of sound). Compare *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir 1992), where the court recognized and enforced Wait's publicity rights against sound-alike defendant.

154. [T]he maxim that all's fair in love, war and the free market. Plaintiffs' case rests on the assumption that the polls operated to siphon off the New Kids' fans or divert their resources away from 'official' New Kids products. Even were we to accept this premise, no tort claim has been made out: 'So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means. . . In short, it is no tort to beat a business rival to prospective customers.' (Citations omitted.)

New Kids On The Block v. News America Publ'g, Inc., 971 F.2d 302, 310 (9th Cir., 1992) (New Kids, a musical group, brought suit against newspapers alleging infringement from use of group's trademark in polls on group's popularity. The Court of Appeals held that newspapers were entitled to nominative fair use defense; the fact that newspapers used toll telephone numbers to conduct poll which competed with services offered by group did not make defense unavailable; the use of group's name did not amount to commercial or common-law misappropriation under California law; and musical group did not have claim for intentional interference with respective economic advantage based on newspapers' fair and reasonable use of mark).

155. Madow, *supra* note 76, at 192-95, 209.

Scripps-Howard Broadcasting Co.,¹⁵⁶ but today it is even more pertinent, given the lucrative returns that celebrities enjoy for their endorsements.

The answer to this economic rationale is that society already rewards generously successful athletes, actors, and entertainers for their contributions and compensates them for the "sweat of the brow" or "economic rent" they have invested in developing their identities.¹⁵⁷ The economic-incentive argument, however, fails to distinguish between the entertainment value generated by celebrities and the value of what is secured by a right of publicity, a secondary income.¹⁵⁸

A different economic argument, in favor of a private property right on the celebrity's persona, is to prevent the overexploitation of celebrities personas and allow the celebrity to maximize her advertising value. This, also called 'rent dissipation theory,' is different from the usual Legal Realist Theories.¹⁵⁹ First, it is based on modern economic theory and second, it is been made simple in order to be falsifiable.¹⁶⁰

156. 433 U.S. 562 (1977).

157. Moreover, the additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated. Actor Jim Carrey, for example, received twenty million dollars for starring in the movie *The Cable Guy*. . .and major league baseball players' salaries currently average over one million dollars per year. . .Such figures suggest that 'even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative effort and achievement. . .In addition, even in the absence of publicity rights, celebrities would still be able to reap financial reward from authorized appearances and endorsements. The extra income generated by licensing one's identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment. Thus, while publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of that incentive has been exaggerated. (Citations omitted)

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 974 (10th Cir., 1996) (Parody trading cards producer brought action against baseball players association to obtain declaratory judgment that parody trading cards did not infringe on players' publicity rights. The Court of Appeals held that producer's First Amendment rights outweighed players' right of publicity.)

158. Even if there is some substitutive effect, and card collectors with limited resources decide to buy parody cards instead of traditional, licensed cards, the small amount of additional income generated by suppressing parody cards will have little, if any, effect on the incentive to become a major league baseball player.

Id

159. Grady, *supra* note 147, at 115-116.

160. *Id.* at 116 ("Ideally, a theory should be both falsifiable and true.") See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3.3, at 43 (4th ed. 1992).

It might seem that creating a property right in such uses would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However, whatever information value a celebrity's endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture. . .The value of associating

There are several problems with this line of reasoning. For instance, the value of paraphernalia increases as the number of consumers increases. However, where "everybody's got one," because there are options other than going to the star, the effect is that there is too much paraphernalia and the prices go down. Where the star has total control of the use of her persona, the effect becomes that of underproducing or overpricing — typical of every monopolistic situation. On the contrary, that rationale works for advertisers since they would not want to buy the celebrities' images if they were over exposed. The economic rationale, to prevent over exploitation in advertising, is the most plausible argument to justify a right of publicity for commercial use. The extent of this right should be limited to licensing the use of celebrity's names for brand advertisement or endorsement. But, the use on paraphernalia would fall outside of the celebrity's dominion.

Madow makes an interesting reflection in his article.¹⁶¹ He suggests that the problem with economic analysis is that it is based on quantity, not quality.¹⁶² The economic view disregards a central question; that is what is the place that celebrities should occupy in our culture?¹⁶³ Nobody can deny the important role of celebrities in modern society; even public figures turn to entertainers for reflected status. But, this cult of the celebrity has some negative social effects, somehow disregarded; people become passive spectators of celebrities' private lives, their lifestyle, etc.¹⁶⁴ This identification with the famous may provide many with a temporary evasion from their own anonymity and routine, but in the long run it is just an illusion.¹⁶⁵ The question is then, if we should encourage this cult with a broad right in the hands of the celebrity, or should we limit the right to protect what is fair (performance values) and to prohibit what is unfair (advertising misuse)?¹⁶⁶

3. Advertising Deception and Consumer Protection

This rationale emphasizes the function of the right of publicity as a private law mechanism for advertising regulation. The right contributes to protect consumers from deceptive trade practices, like false represen-

the celebrity's name with a particular product will be diminished if others are permitted to use the name in association with their products.

161. Madow, *supra* note 76.

162. *Id.* at 214.

163. *Id.* at 226.

164. *Id.* at 228.

165. *See generally id.*

166. *Id.*

tations of endorsement or of sponsorship. It also deters advertisers of dangerous or shoddy products from manipulating consumers by using celebrities' images. According to Professor Treece, the right of publicity operates to protect consumers from being "misled about the willingness of a celebrity to associate himself with a product or service."¹⁶⁷

The first problem with this rationale is that it has a spillover effect. The consumer deception argument is that the right of publicity enables celebrities to prevent commercial uses of their personas that are not in any way misleading or fraudulent. The right of publicity applies even where there is no danger that consumers will think that the featured celebrity has endorsed the product. One example is the increasingly common advertising practice of using celebrity "look-alikes" and "sound-alikes." Most consumers understand that it is not the real celebrity. It is also evident that today's average consumer does not assume the endorsement of a celebrity even when buying paraphernalia articles (such as posters, T-shirts, etc.). It then seems that the focus of the right of publicity is not on the consumer's interest, but rather on the celebrity's interest in controlling and benefiting from the economic value of her identity.

The right of publicity for the purpose of avoiding consumer deception is redundant. The celebrity can obtain appropriate relief under the Lanham Act or a state law equivalent. The right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement and is thus potentially more expansive than the Lanham Act. One commentator recommends that courts either use the Lanham Act as a type of federal publicity right or incorporate the Act's likelihood-of-confusion requirement into the right of publicity.¹⁶⁸ Another problem is that the right of publicity does not guarantee true advertising. The endorsement does not necessarily mean that there will be good quality or truth in the

167. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).

168. Recent cases involving celebrity look-alikes and sound-alikes bear this out. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that use of a Tom Waits sound-alike in a radio ad for a food product violates the Lanham Act), *cert. denied*, 113 S. Ct. 1047 (1993); *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992) (involving a claim stated under the Lanham Act for use of a look-alike); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988) (holding that use of a Woody Allen look-alike in an ad for a clothing store violates the Lanham Act unless accompanied by an effective disclaimer of any connection between Allen and the product; injunctive relief granted); & *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (holding that use of an Allen look-alike in an ad violates the Lanham Act because it creates a likelihood of confusion as to his endorsement or involvement with the advertised product; injunctive relief granted).

claims made in the ads. As Professor Shiffrin notes, the right of publicity gives a public figure power "to control the dissemination of truth for his or her own profit."¹⁶⁹ This interest contradicts the higher interest in society's right to free speech.

D. A Sociological Criticism of the Right of Publicity

The commercial exploitation of famous personae is nothing new, dating back to the eighteenth century.¹⁷⁰ If the right of publicity is 'inherent,' why is it that the right did not appear until recently? As Madow extensively explains in his article,¹⁷¹ the key for the recognition of the right has been the triumph of a centralized mass media, that had the power to make all believe that famous persons deserved to reap the socially created symbols and meanings for themselves. Some part of the doctrine even describes the right of publicity as a "commonsensical" or "self-evident legal right."¹⁷² But, the right of publicity, while universal in form, is in reality, a special celebrity's right; for non-celebrities the right of privacy is enough.

The right of publicity has been defined as, "the right of a person to control the commercial use of his or her identity."¹⁷³ But, this definition resembles more the privacy right of every person, which would still apply to the celebrity as a human being. A part of the doctrine opines that it would have been easier to construe the right of privacy to protect some of the uses covered by the right of publicity, instead of creating a parallel right of publicity.¹⁷⁴ That publicity sphere of the right of privacy would remain with the celebrity, unlike other aspects of her privacy rights, that are gone when the star enters the public eye.

Every person has the same right to control the manner of the commercial exploitation of her persona. The difference with a non-celebrity is that the celebrity, from the moment she gets in the public eye, trades off much of her personal right to control the use of her persona, which remains untouched in a non-public figure. Her persona is used by the

169. Steven Shiffrin, *The First Amendment And Economic Regulation: Away From A General Theory Of The First Amendment*, 78 NW. U. L. REV. 1212, (1983).

170. See LEO BRAUDY, *THE FRENZY OF RENOWN: FAME & ITS HISTORY* 452, 380 (1986) (Braudy identifies the mid-18th century as the period in which "the rapid diffusion of books and pamphlets, portraits and caricatures," brought forth "a new quality of psychic connection between those who watch and those who. . .perform on the public stage.") *cited in* Madow, *supra* note 76, at 94.

171. See generally, Madow, *supra* note 76.

172. MCCARTHY, *supra* note 81.

173. *Id.* § 1.1{B}{2}, at 1-5.

174. *Id.*

public and the media, without her consent. It is a collective work and, as such, the members of society should be free to use the public persona of the celebrity for communication or speech purposes — including the symbolic speech of most paraphernalia products.

Most courts have accepted the existence of the right, without much questioning. It appears less obvious to courts that individuals and groups also use star's signs in their everyday lives to communicate meanings of their own making. This unclearness is reflected in the unsound and incoherent history of the right of publicity, owing much of its recognition to the pressure of a powerful entertainment industry. The right exists now, but at the expense of compelling values such as free expression and cultural pluralism. The property that is assigned to celebrities provides them with a right to decide the image that they want to project on society, in a sort of monopoly that ultimately constricts alternative meanings. What happens eventually is that the power to license becomes the power to suppress speech and power, ultimately to limit the communicative opportunities of the rest of society.

On the Internet, this expressive process of society becomes more apparent; it is the tip of the iceberg. Because it is a better realization of democracy where everyone can get his or her word out to the world, a publicity right clashes more violently on-line than in the mass media off-line world. The weak basis for this right should re-open the question of the scope of the right of publicity, and more important, the impact of publicity rights on the distribution of cultural power in the digital age. The new age is bringing along the era of individualization and customization of consumer products. In particular, infotainment is going to be so custom made that there is going to be a great loss of traditional common ground.¹⁷⁵ There will be less chances to outperform in anything on a long term basis. With a centralized media, it is easy to reach a majority of the audience, but with diversification, stars will have to increase their efforts.

IV. LEGAL ANALYSIS OF THE RIGHT OF PUBLICITY

This section analyzes the limits that the First Amendment interest of society imposes on celebrities' individual right of publicity. It also identifies the different on-line uses of the likeness and persona of the celebrity, characterizes them by analogy to real world uses, and weighs them vis-à-vis the First Amendment. The legal analysis reaches the conclusion that

175. See Mike Yamamoto, *Marketing the Medium*, CNET NEWS, Sept. 27, 1996 (visited Oct. 20, 1996) <<http://www.news.com/SpecialFeatures/0,5,3915,00.html>>.

most of the on-line uses fall outside of the infringement of publicity rights, given the communicative nature of the Internet. But, it is critical for those involved in the application of the law to understand the digital medium, otherwise the wrong analogies will lead to wrong decisions.

A. The First Amendment exception to the Right of Publicity

One clear aspect of this controversial right of publicity is that it implicates speech. Because the right involves the control of images, names, or information that appear in the media, a public figure's exercise of the right, might curtail the First Amendment right of society over this information. Thus, this monopoly of the celebrity is subject to restrictions imposed by the interest in the free flow of information.¹⁷⁶ However, the key question is where do the boundaries between the right of publicity and the First Amendment lie?¹⁷⁷ This section tries to set the broad framework for the next section, where an analysis of the interplay of particular uses of publicity rights with the First Amendment will take place.

There are some constitutional principles to keep in mind when considering right of publicity cases. The First Amendment is not absolute because not all speech is protected, only free speech. To determine which speech is free, the courts balance different categories of speech against opposing personal and property rights.¹⁷⁸ Different types of constitutional "speech" are given different levels of weight. News and political opinions enjoy the highest protection, since they are at the heart of the First Amendment.¹⁷⁹ Fiction stories are second because they are informational and entertaining.¹⁸⁰ Commercial speech (advertising in-

176. See Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 867-873 (1995) (describing First Amendment concerns).

177. See Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47 (1994) (the author makes a case for resolving the conflict between the Right of Publicity and the First Amendment by applying a property and liability rule framework. The proposed system would provide some organization on the analysis of right of publicity cases by the courts). See also Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979) (the co-authors propose an analytical framework for balancing the First Amendment with the right of publicity in media portrayals.)

178. For example in copyright law the court balances the copyright claim against the fair use defense under the First Amendment. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (applies the fair use defense to a parody of a copyrighted song).

179. *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939, 2945 (1985).

180. *Harper & Row Publishers Inc., v. Nation Enterprises*, 105 S.Ct. 2218, 2232 (1985); *Winter v. New York*, 333 U.S. 507, 510 (1948).

cluded) is given the lowest protection.¹⁸¹ A much less compelling interest is sufficient to place some restriction on "commercial speech," than would be necessary if the speech were non-commercial.¹⁸²

The Supreme Court has often remarked that, "The line between the informing and the entertaining is too elusive for the protection of [the first amendment]. . . What is one man's amusement, teaches another doctrine,"¹⁸³ and "entertainment itself can be important news."¹⁸⁴ At times, the First Amendment has been construed as a governmental form of protection for the media. For example, by immunizing the unauthorized use of a celebrities' persona by a newspaper. Lower courts have also held that a remedy, for false advertising or trademark infringement, should go no further in imposing a restraint, on commercial speech, than is reasonably necessary to accomplish the remedial objective of preventing false advertising or likely confusion of the consuming public — the least restrictive alternative rule. As a procedural matter, the Supreme Court has held that the plaintiff's use of state law in a civil case is sufficient "state action" to trigger the First Amendment.¹⁸⁵ The same is true in intellectual property cases brought in federal court.

How does this settled Constitutional doctrine fit in with the right of publicity? Unfortunately, the only time the Supreme Court has balanced the right of publicity against the right of the media to cover news was in the *Zacchini* case. But, this was a unique set of facts, where what was at stake was the primary activity of the celebrity (the performance value) and not the more usual fact-pattern of the use of her image for advertising or more obvious commercial purposes.¹⁸⁶

The right of publicity is characterized as an intellectual property right. A defendant may not take, without authorization, a plaintiff's image in order to use it as a vehicle to attract attention to the defendant's protected message. In addition, nobody can be forced to speak for some-

181. *Supra* note 180.

182. *Virg. State Bd. of Pharmacy v. Virg. Citizens Consumer Council Inc.*, 425 U.S. 748, 761 (1976); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. Of New York*, 447 U.S. 557, 561 (1980); *44 Liquormart Inc. v. Rhode Island*, 116 S.Ct. 1495, 1507 (1996).

183. *Winters v. New York*, 333 U.S. 507, 510 (1948).

184. *Zacchini*, 433 U.S. at 578.

185. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

186. *Zacchini* involved the broadcast of the plaintiff's entire performance. "[The claim] may be the strongest case for a 'right of publicity'- involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired this reputation in the first place." *Zacchini*, U.S. 433 at 576.

one's product or to lend one's property as a vehicle for a defendant's speech.

On the other hand, the courts have consistently protected the constitutional right to free dissemination of ideas. "The right of publicity has not been held to outweigh the value of free expression"¹⁸⁷ and First Amendment policy considerations clearly immunize the entertainment or newsworthy uses, despite the celebrity's property interest.¹⁸⁸ The Restatement of Unfair Competition restricts the right of publicity from, "the use of a person's identity in news reporting, commentary, entertainment, in works of fiction or in advertising that is incidental to such uses."¹⁸⁹ The First Amendment insulates these uses from illicit appropriation.

Many cases of appropriation of a public figure's likeness involve situations in which the infringer's use is not characterized as speech, because it does not involve spreading information in any conventional medium — paraphernalia, for example.¹⁹⁰ In some cases, however, defendants might assert that these are forms of "symbolic speech" designed to ex-

187. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979). (Bird, J., concurring) (Nephew of the deceased movie actor Rudolph Valentino filed suit seeking damages and injunctive relief on the theory that defendants had misappropriated Valentino's "right of publicity" and that plaintiff, as Valentino's legal heir, was the present owner of that right. The Supreme Court held that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but the right is not descendible and expires upon the death of the person so protected.)

188. By analogy to copyright law and the fair use doctrine, parody, burlesque, satire and critical review might be immune from the right of publicity because of their contribution as entertainment and as a form of literary criticism. In contrast to an imitator, who usurps a work for commercial gain without contributing substantially to the work, a commentator, parodist or satirist makes use of another's attributes in order to create a larger presentation. (Citation omitted).

Groucho Marx Productions, Inc., v. Day & Night Co. Inc., 523 F. Supp 485, 492-93 (S.D.N.Y. 1981). (Assignees of the Marx Brothers' rights of publicity brought action against producers of musical play, "A Day in Hollywood/A Night In the Ukraine" for misappropriation of propriety rights, for interference with contractual relations, and for infringement of common-law copyright and unfair competition and defendants asserted third-party claims. The District Court held that New York courts would not only recognize the right of publicity, they would recognize the descendibility and assignability of that right; assignability did not require that claimant exploit his rights of publicity during lifetime by commercial use other than celebrity's main commercial activity; exploitation in movies by the Marx brothers of characters which they had created was sufficient to create rights which were capable of being assigned; those characters were infringed by musical play in which characters reproducing the Marx brothers' style of humor appeared; and that use of Marx brothers characters was not protected by First Amendment as a parody.)

189. RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION 47 (1995).

190. "These objects, unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated." *Guglielmi*, 603 P.2d at 463.

press or identify themselves with a public figure's image. A court confronting this argument should closely scrutinize the defendant's actions in order to determine whether they are in fact communicative and whether such activities would normally be viewed by outsiders as evidence of the defendant's desire to engage in symbolic speech. If a court found that First Amendment interests were involved, the plaintiff's right of publicity would not likely prevail over the defendant's exercise of free speech.¹⁹¹

In post mortem cases, the conflict is more acute. A right of publicity of long post-mortem duration allows public figures' heirs to enjoin uses of the celebrities' personas for about fifty years after their deaths.¹⁹² On the contrary, with the passage of time, many public figures unquestionably come to represent ideals or role models for society. The fact that someone wants to market the image and likeness of these figures (e.g., memorabilia), after their death, may indicate that the figures have come to convey these particular ideals. "Attempts by the heirs of such figures to enjoin the use of their ancestors' images could prevent the ideals embodied by the images from freely circulating."¹⁹³

Some part of the doctrine has criticized this traditional conception: "The purchase and display of celebrity memorabilia does not, therefore, represent public access to media-disseminated information or entertainment as much as it becomes a form of public expression through a 'media' of its own." Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 495 (1981).

More recently, the 10th Circuit rejected a right of publicity claim over baseball trading cards:

MLBPA contends that Cardtoons' speech [baseball trading cards] receives less protection because it fails to use a traditional medium of expression. The protections afforded by the First Amendment, however, have never been limited to newspapers and books. The Supreme Court has relied on the First Amendment to strike down ordinances that ban the distribution of pamphlets, the circulation of handbills, and the display of yard signs. Moreover, many untraditional forms of expression are also protected by the First Amendment. . . Thus, even if the trading cards are not a traditional medium of expression, they nonetheless contain protected speech. (Internal citations omitted.)

Cardtoons, 95 F.3d at 969.

191. *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Products, Inc.* 694 F.2d 674, 685 (11th Cir. 1983). (Weltner, J., concurring specially) (arguing that reproductions of King should be considered protected speech in the same manner as are statues of Confederate soldiers produced to express a particular sentiment).

192. *Schumann v. Loew's Inc.*, 135 N.Y.S.2d 361, 369 (Sup. Ct. 1954) (dismissing attempt by the heirs of the composer, who had died more than 100 years before, to enjoin the production of movie based upon his life); *Hicks v. Casablanca Records*, 426 F. Supp (S.D.N.Y. 1978). (Agatha Christie's heirs tried to prevent the production of a movie and a book based on an event in Christie's life. The first amendment rights of the defendants outweighed the heirs' inherited right of publicity.)

193. *Schumann*, 135 N.Y.S.2d at 369.

There is an uncertainty concerning where the line is to be drawn to protect "free speech," because it turns upon the content of the speech (commercial v. non-commercial) and the weight of the countervailing tort or property interest asserted (the celebrity's right of publicity).¹⁹⁴ The analysis could be much simpler. The right of publicity should only prevail in two contexts, to protect performance values when this use is not incidental, and to prevent the unauthorized use for advertising purposes. The other incidental uses: newsreporting, commentary, parody, and the controversial paraphernalia should all be protected under the First Amendment. Another benefit of this proposed scheme is that it would be more compatible with the long established First Amendment doctrine.

B. The First Amendment vis-à-vis the Right of Publicity on the Internet

This section weighs different uses of the public persona on the Internet, described in part II, against the First Amendment. In order to make the analysis, this article first draws an analogy of each of the uses on the net, to uses in the real world that have already been tried in the case law. The article then draws a conclusion for each use, focusing upon whether they should be immune to the right of publicity.

1. Alt. fan Newsgroups and Listservs as News, Gossip, Commentary

Newsgroups and Listservs¹⁹⁵ are just on-line archived exchanges of information among the users participating in these forums. They are the

194. In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared. Is the Samsung parody any different from a parody on Saturday Night Live or in Spy Magazine? Both are equally profit-motivated. Both use a celebrity's identity to sell things—one to sell VCRs, the other to sell advertising. Both mock their subjects. Both try to make people laugh. Both add something, perhaps something worthwhile and memorable, perhaps not, to our culture. Both are things that the people being portrayed might dearly want to suppress.

White, 989 F.2d at 1520.

195. Definitions of these terms are as follows:

24. One-to-many messaging. The Internet also contains automatic mailing list services (such as 'listservs'), [also referred to by witnesses as 'mail exploders'] that allow communications about particular subjects of interest to a group of people. For example, people can subscribe to a 'listserv' mailing list on a particular topic of interest to them. The subscriber can submit messages on the topic to the listserv that are forwarded (via e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This

equivalent to real world conversations since they are a one-to-many way of communication.¹⁹⁶ But, because they are archived, they also resemble news, gossip, or commentary.

Conversation is perhaps the most obvious expression of speech. A newsgroup would be in this category, somewhat like a fan-club that meets regularly to talk about the star, her movies, performances, or what have you. This type of communication is an essential part of the market-

service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers. There are thousands of such mailing list services on the Internet, collectively with hundreds of thousands of subscribers. Users of 'open' listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be 'closed,' i.e., only allowing for one's acceptance into the listserv by a human moderator.

25. Distributed message databases. Similar in function to listservs — but quite different in how communications are transmitted — are distributed message databases such as 'USENET newsgroups.' User-sponsored newsgroups are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users. Like listservs, newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. Some USENET newsgroups are 'moderated' but most are open access. For the moderated newsgroups all messages to the newsgroup are forwarded to one person who can screen them for relevance to the topics under discussion. USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET 'servers') around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages, like the original messages, are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.

Reno, 929 F.Supp. at 834.

196. [N]o public purpose would be served by permitting Stern to silence Delphi; on the contrary. Indeed, it is ironic that Stern, a radio talk show host (as well as author and would-be politician) seeks to silence the electronic equivalent of a talk show, an on-line computer bulletin board service.

Stern v. Delphi Internet Serve Corp., 626 N.Y.S.2d 694, 700 (Sup. Ct., 1995). (Radio celebrity brought action against Delphi — Online Service Provider — alleging commercial misappropriation arising from company's use of celebrity's name and picture to advertise its electronic bulletin board for debate on celebrity's candidacy for office of governor. The Supreme Court, New York County, held that Delphi was "news disseminator" for purpose of commercial misappropriation statute, and the use of celebrity's name and photograph fell within "incidental use" exception to liability. The Court granted defendant's summary judgment.)

place of ideas and its protection is at the heart of the First Amendment. Any use of the celebrity's persona as part of this communicative exchange would be permissible, even though the image or opinions purported might not be the ones intended by the celebrity herself. But, one cannot ban speech just because it is distasteful, or because one disagrees with it or dislikes it.¹⁹⁷

The problem is more complex if one considers the archived feature of these newsgroups. All messages posted to these groups remain stored or archived, resembling real world public archives of periodic publications, such as magazines, specialized newsletters, newspapers, and so forth.¹⁹⁸ The newsgroup topic relevant to this analysis would be the life and deeds of the rich and famous. So, maybe the best comparison that can be drawn is to gossip magazines, trade magazines, or even newspapers, if the content is newsworthy. Is this kind of media insulated from right of publicity infringement?

197. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. (Citations Omitted) *Cohen v. State of California*, 91 S.Ct. 1780, 1788 (1971).

198. Although only paid subscribers may access Delphi's on-line information services from their computers or terminals, this service is analogous to that of a news vendor or bookstore, or a letters-to-the-editor column of a newspaper, which require purchase of their materials for the public to actually gain access to the information carried. As Judge Leisure of the United States District Court, Southern District of New York, has noted, 'a computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor. . . than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.' *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 140 (S.D.N.Y.1991). In *Cubby*, Judge Leisure found that CompuServe, a computer service company that provides service similar to Delphi, was in essence 'an electronic, for-profit library' which is afforded the same First Amendment protections as distributors of publications. Similarly, here it is evident that Delphi's on-line service must be analogized to distributors such as news vendors, bookstores and libraries. (Emphasis added)

Stern, 626 N.Y.S.2d at 697.

The use of the celebrity's persona in the off-line media as part of "news"—information, gossip, commentary, entertainment—about a person is constitutionally protected from infringement of the right of publicity.¹⁹⁹ But, there has to be a connection between the use of the persona and the content conveyed in the news.²⁰⁰ Otherwise, the use of the persona would be for non-communicative purposes — probably, commercial and very little informational — falling outside the scope of First Amendment protection.²⁰¹

The courts have defined the term 'news' very broadly. "News" comprises any issues of public concern which, "is by no means limited to the dissemination of news in the sense of current events but extends [to] all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general."²⁰² For Constitutional purposes, 'issues of public concern' are those that one can find in newspapers, magazines, and the media.²⁰³ The thrust is that the media serves the public thirst for information that is, "needed or appropriate. . .to cope with the exigencies of [the] period."²⁰⁴ It is obviously a non-exclusive list that includes anything that may be "considered newsworthy to special groups."²⁰⁵ Thus, gossip is part of this list of newsworthy items because, "[g]ossip columns open people's eyes to opportunities and dangers [and] are genuinely informational."²⁰⁶

199. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 128-29 (1969) (Just as a public figure's right of publicity must yield to the public interest so too must the right of publicity bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest).

200. *Id.*

201. *Dallesandro v. Henry Holt & Co.*, 166 N.Y.S.2d 805 (1957) (photo of author talking to plaintiff was reproduced on cover of a book. Held to be immune from liability because it illustrated the content of the book although plaintiff was not mentioned in the book.) *Compare Grant*, 367 F. Supp. at 878 (The use of Cary Grant's photo in an article about men's fashion "serves no function but to attract attention to the article.")

202. *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501,506 (Sup. Ct. 1968). (Action by television comedian, who conducted mock campaign for presidency, to enjoin defendants from marketing poster embodying plaintiff's photograph. Plaintiff moved for preliminary injunction. The Supreme Court New York County held that plaintiff was not entitled to preliminary injunction in view of apparent privilege deriving from picture's public interest character. Temporary injunction denied).

203. *Id.*

204. *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967) *quoting* *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

205. *Welch v. Group W. Prod. Inc.*, 525 N.Y.S.2d 466, 468 (Sup. Ct. 1987) (not only political happenings and social events but also articles of interest to consumer groups and fashion events).

206. Richard A. Posner, *The Right of Privacy*, 12 GA L. REV 393, 396 (1978).

Though gossip may look trivial, it is considered to have an important social function. The modern press could be considered as, "performing a traditional function that no longer can be accomplished by person-to-person gossip alone."²⁰⁷ This traditional conception is again turned around on the Internet. Here person-to-person communication exists and gossip is spread easily, in part due to those celebrity devoted user-groups that exclusively discuss celebrities' lives. One should then infer that the content of these newsgroups is newsworthy, informational, and thus, protected by the First Amendment.

Examples of topics held newsworthy by the courts include the latest fashion of women's apparel,²⁰⁸ a celebrity's escape to a Jamaican resort,²⁰⁹ and a movie star's love affair with another star.²¹⁰ Again, this illustrates the kind of conversation one can expect to find in these oriented alt.fan newsgroups which would fall under a permitted use of the celebrity's name and persona. For instance, a group might be called alt.fan.stallone; users can post photos from Rocky — believing that they are copyright clear— or can reveal the latest gossip on his love life.

In order to guarantee the First Amendment protection, the news usage has to be reasonably related to the content of the story.²¹¹ If the use

207. *Time Inc. v. Sand Creek Partners*, 825 F. Supp. 210 (E.D. Wis. 1993).

208. *Stephano v. News Group Publications, Inc.*, 485 N.Y.S.2d 220 (1984). (Plaintiff, a professional model, brought suit claiming that defendant used his picture for trade or advertising purposes without his consent, and thus violated his statutory right to privacy. The Court of Appeals reversed and held that defendant's publication of plaintiff's picture was protected by newsworthiness exception).

209. *Booth v. Curtis Publ'g. Co.*, 15 A.D.2d 343 (N.Y. 1962). (A well-known actress brought an action against the publisher of a magazine and its advertising agency for damages for an alleged invasion of her right to privacy in violation of the Civil Rights Law. The Appellate Division reversed and held that where a photograph of the actress was properly published by the publisher in its magazine, and subsequently the publisher had the photograph republished in other magazines to advertise the publisher's magazine, the republication of the photograph was not a violation of her right to privacy in violation of the Civil Rights Law.)

210. *Eastwood v. Superior Court of Los Angeles County*, 149 Cal. App. 3d 409 (1983). (National Enquirer featured an article falsely claiming that Eastwood was involved in a romantic triangle with singer Tanya Tucker and actress Sondra Locke. The Enquirer also ran a television advertisement that featured Clint Eastwood's photograph and mentioned the story. Eastwood asserted that the unauthorized use of his name and photograph in both the television advertisement and on the front page of the paper damaged his right to control the commercial exploitation of his name, photograph, and likeness and also injured his feelings and privacy. The court recognized the viability of both a common law and statutory cause of action under California law and commented on distinctions between the two. The court emphasized that an action at common law presents a less onerous burden than an action under California Civil Code § 3344(a) since the plaintiff need prove neither a knowing use of his persona nor a direct connection between the use and a commercial purpose).

211. See *supra* note 201 and accompanying text.

is merely commercial—the use of the name or picture just to give attention to the publication and sell more copies—it is an infringement of the right of publicity.²¹² The line is blurry between what is news or story and what is advertisement in disguise. In our newsgroup example, if we set up a newsgroup about athletics to give publicity to the sneakers we sell, and we call it the alt.fan.carl_lewis it would obviously infringe upon Lewis' right of publicity. The New York Court of Appeals has emphasized that the test of a “real relationship” between a picture and the content of the news is to be applied broadly, in order to find newsworthiness immunization for the media.²¹³

News media, such as on-line bulletin boards, have been afforded the same First Amendment protection as the one given to more traditional printed media. In *Stern v. Delphi*, a case that involved the use of comedian Howard Stern's image for the advertising of a bulletin board about the celebrity, the court recognized that:

Although only paid subscribers may access Delphi's on-line information services from their computers or terminals, this service is analogous to that of a news vendor or bookstore, or a letters-to-the-editor column of a newspaper, which require purchase of their materials for the public to actually gain access to the information carried. . . In *Cubby*, Judge Leisure found that CompuServe, a computer service company that provides service similar to Delphi, was in essence ‘an electronic, for-profit library’ which is afforded the same First Amendment protections as distributors of publications. Similarly, here it is evident that Delphi's on-line service must be analogized to distributors such as news vendors, bookstores and libraries.²¹⁴

All the alt.fans.newsgroups fall into this category and thus, they are protected speech. Besides, the vast majority of these boards are not for profit. This means that the non-commercial speech flowing in these multi-point conversations, including pictures, sounds, and words should not constitute infringement of the right of publicity because they should be protected by the First Amendment. The reality, though, is that a number of them have received ‘cease and desist’ letters which have forced them to pull their newsgroups down.

212. *Id.*

213. *Dallesandro*, 166 N.Y.S.2d 805 (Photo of author talking to plaintiff was reproduced on cover of a book. Held to be immune from liability because it illustrated the content of the book although plaintiff was not mentioned in the book).

214. *Delphi*, 626 N.Y.S.2d at 697.

2. Fans' Web Sites as Biographies On-line

Web sites²¹⁵ are the millions of electronic publications that are available through the WWW. The content is formatted in HTML mark-up language (consisting basically of a bunch of tags around the text or images of each page) and includes hypertext links to jump from one page to another, without a linear order.

Those web sites depicting a celebrity look pretty much like short biographical descriptions, accompanied by photos, and maybe sound and video clips. The clear analogy for these web sites is to the real world biographies about famous people. The courts have upheld the use of the public persona for biographies in printed media as newsworthy and protected under the First Amendment. The best known decision is the Howard Hughes case, where the court held:

The Biography of Howard Hughes, published by defendants herein, irrespective of its literary merit or style falls within those 'reports of newsworthy people or events' which are constitutionally protected and which are outside the proscription of the New York 'Right of Privacy' statute. . . Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.²¹⁶ (Internal citations omitted.)

215. The Web utilizes a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound, animation and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one can 'click' using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such 'hyperlinks' allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world. . .

The World Wide Web is a series of documents stored in different computers all over the Internet. Documents contain information stored in a variety of formats, including text, still images, sounds, and video. An essential element of the Web is that any document has an address (rather like a telephone number). Most Web documents contain 'links.' These are short sections of text or image which refer to another document.

Reno, 929 F.Supp. at 836.

216. *Rosemont Enter.*, 294 N.Y.S.2d at 128-29 (Action by assignee of right to exploit name and personality of public figure against publisher and author of biography of such public figure. The Supreme Court New York County held that the factual report of newsworthy persons and events falls within constitutional protections for freedom of speech and no redress is available even for material and substantial falsification in such reporting in absence of proof that report was published with knowledge of its falsity or in reckless disregard for truth, and that evidence in the action failed to establish that the biography contained material and sub-

The rationale put forth by the courts to support this particular use of a celebrity's identity is that, "unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use."²¹⁷ This doctrine should be applied by analogy to a web site depicting a star or celebrity. The only difference is that the web site biography is digital as opposed to a printed version.

Moreover, media profit and advertising do not remove First Amendment protection. The Supreme Court has stated on several occasions that, "books, newspapers, and magazines [that] are published and sold for profit do not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."²¹⁸ The fact that the publication is sold for profit does not automatically take it out of the category of news speech. It will not, in every instance, be considered commercial speech or advertisement. The rule is partially codified in California statutes²¹⁹ and the New York Court of Appeals has held the same.²²⁰

This principle has been applied to television programs which have been sponsored by commercials as well as newspapers and magazines that contain advertisements.²²¹ This means that a web site which features a celebrity could be considered similar to a magazine, or a book depict-

stantial falsifications. The court further held that the public figure had no exclusive rights to his own life story and others need no consent or permission to write his biography. Defendant's summary motion granted).

217. *Matthews v. Wozencraft*, 30 U.S.P.Q.2d 1025 (5th Cir. 1994). (Former undercover narcotics officer filed suit alleging breach of contract, division of marital assets, and misappropriation/invasion of privacy against his former wife and partner, and misappropriation and invasion of privacy against publisher of wife's book, movie studio, and another. The Court of Appeals held that life story was not a "name or likeness" under Texas misappropriation law; appropriation could not occur through fictionalized account of officer's life under "false light doctrine;" novel fell within First Amendment protection for fair use of information in private domain; contract between plaintiff and his former wife regarding ownership rights to their story expired by its own terms; and plaintiff's claim he had ownership rights that should have been distributed in the parties' divorce was barred by *res judicata*).

218. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (U.S.N.Y., 1952).

219. Cal. Civ. Code § 3344(e). The unauthorized use of identity in a commercial medium is not liable "solely because the material containing such use is commercially sponsored or contains paid advertising."

220. "The statute does not define trade or advertising purposes. However, the courts have consistently held, from the time of its enactment, that these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest." *Stephano*, 485 N.Y.S.2d at 225 (Citations omitted).

221. *Newton v. Thomason*, 22 F.3d 1455 (9th Cir.1994). ("A 'commercial purpose' means more than merely using a person's name as part of a cast of characters in a television program advertisement that highlights the program's general plot").

ing the facts of a star's life. Most fans' web sites are not even for profit. But, even with those that are sponsored, or sell advertising space, by following the same line of reasoning as the courts, these could be considered non-commercial speech and thus could be immune to right of publicity claims.

Another interesting question, is whether the use of the celebrity's name, as the title of a web page or even as part of the domain name — *www.clewis.com*, for example, is a violation of the right of publicity? The use of the name of a real person as the name of a character or in a title of a work of entertainment may be exempt from the right of publicity when the name has some sort of connection to the story and it is not picked just to take advantage of the commercial value of the celebrity's name.²²²

Some web sites include video files depicting short video clips. According to their content, there would be two possible cases that might develop. One would involve a video documenting some images on the life of the celebrity. This would be analogous to the news or documentary that the courts have upheld as permissible.²²³ Another use would be the taking of actual works or performances of the celebrity. The best analogy is the *Zachinni* case,²²⁴ where the Supreme Court held for the performer. The broadcast of the complete performance of the canon-ball man was not an incidental use.²²⁵ It did reap benefits from the celebrity's work.²²⁶ As a result, only incidental clips of a performance should be

222. [T]he [Lanham] Act should be construed to apply to artistic works only where the public interest outweighs the public interest in free expression. In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source of the content of the work. . .

Rogers v. Grimaldi, 875 F.2d 994 (2d Cir 1989) (Suit was brought against producers and distributors of movie "Ginger and Fred" for violation of Lanham Act infringement of common-law rights of publicity and privacy. The Court of Appeals held that the title of the movie "Ginger and Fred" gave no explicit indication that Ginger Rogers endorsed the film or had a role in producing it, and thus it was not false advertising of sponsorship or endorsement in violation of the Lanham Act, and the movie title was closely related to the content of the movie and was not disguised advertisement for sale of goods or services or collateral commercial product, and thus did not violate the Oregon law of right of publicity.)

223. *Current Audio, Inc., v. RCA Corp.*, 337 N.Y.S.2d 949, 953-55 (Sup. Ct. 1972). (The Court held that a mixed media print and audio report of a rare 1972 press conference held by entertainer Elvis Presley was not an invasion of any privacy or publicity rights of Presley).

224. 433 U.S. 562 (1977).

225. *Id.* at 579.

226. *Id.*

permitted, in order to protect the livelihood of performers, through the licensing of the works.

A secondary problem with the content of web pages may come from the use of links. Hypertext links²²⁷ are an essential part of web pages since they have the function of relating documents in a non-linear order. Most cyberlawyers defend the functional task of the links as content-neutral connectors. But, some users, mainly businesses, do not consider these links to be user-friendly.²²⁸ The commercialization of the Internet has brought up the theoretical possibility of liability when using links.²²⁹

227. 36. . . .Most Web documents contain 'links.' These are short sections of text or image which refer to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored. Links for example are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but also as cross-references, footnotes, and new forms of information structure.

37. Many organizations now have 'home pages' on the Web. These are documents which provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization. . .

39. Each of these links takes the user of the site from the beginning of the Findings to the appropriate section within this Adjudication. Links may also take the user from the original Web site to another Web site on another computer connected to the Internet. These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique. The Web was designed with a maximum target time to follow a link of one tenth of a second.

Reno, 929 F.Supp. at 836-37.

228. See, for example, *The Washington Post Co. v. Total News Inc.*, 97 Civ. 1190 (S.D.N.Y., 1997). (A group of news sources, including the Washington Post, LA Times, Reuters, CNN, and others, have brought suit against the Total News web site. In their suit filed on Feb. 20, the plaintiff's allege that the defendant's links and "framing" of their content constitutes trademark dilution, copyright infringement, trademark infringement, false designations of origin, false representations and false advertising under 43(a), as well as five other state causes of action.) The case was settled last June '97. The media companies agreed to grant TotalNews a "linking license" so that it can still hyperlink to stories on its sites. See Nick Wingfield, *TotalNews, Publishers Settle Suit*, CNET NEWS, June 1997, (visited June 5, 1997) <<http://www.news.com/News/Item/0,4,11272,00.html>>.

229. See Jonathan Ezor, *OPINION: Avoiding Trademark, Copyright Infringement. Images, Links, URLs Create Problems for Web Liability*, ADVERTISING AGE, (visited May 22, 1997) <<http://adage.com/interactive/articles/19961209/article8.html>>.

Theoretically one could claim liability on several grounds. However, some of these claims lose merit when considering the implied license to linking, and the availability of technological solutions to avoid unwanted visitors from other sites. One claim would be trademark infringement. Suppose the website had a section with related sites. One of the links brings you to a corporation's web site that has a trademark on the name and logo. The designer of our site has used the corporation's name and the logo as the description for the link to the corporation's site. The link itself would constitute trademark infringement.

Again, the key to a sound policy on the use of links should derive from the very nature of these hypertext tags. This article proposes the traffic-sign metaphor; other commentators consider links as mere citations to other content, or a sort of referral service. Either analogy suggests that the link is a mere Internet address, a piece of factual information — the numerical address behind the domain name. Links only provide a path for the browser to go and get other information. Then, it is the user and her browser who actually retrieve that information and display it, something that they have an implicit right to do. But, if a web site owner does not want to be linked to certain web sites, there are technology fixes available. Even so, some parties are turning to the courts to try to reinforce what they believe are their absolute private property rights, as if their cases fit into a well-settled legal regime.²³⁰ But, the merit of such cases is low because they disregard the nature of the Internet and the way that it works.

In the case of a link bearing the name of a celebrity, a mere citation does not represent that the content is associated with the citing party nor does it provide the content itself. A good analogy can be drawn to a case where the holder of the trademark, "Boston Marathon," tried to stop a television station from using the name of the event.

[T]he words 'Boston Marathon'. . .do more than call attention to Channel 5's program; they also *describe* the event that Channel 5 will broadcast. Common sense suggests (consistent with the record here) that a viewer who sees those words flash upon the

Second, if we use an image-link, where the graphic is copyrighted, without the authorization of the owner of the image, we would infringe upon his copyright on his work. Copyright infringement may also arise by showing as part of our web site an image from another site without copying it — we are just 'image-mining' somebody else's web page.

Using frames could be very problematic, from a legal standpoint. First they can be misleading for the average user since usually the URL stays the same even when you click a link to another web site. The information from this other web site will appear in your screen, wrapped under the frames of the initial web site where you linked from. Trying to bookmark a page that is outside the site will be impossible since the original URL of the framed site is the one that remains. It could lead to copyright liability as one can argue that the site with the frames is showing another's work under a different look, without permission. Even trademark infringement could be argued if the frames create confusion as to the origin of somebody else's goods or services.

Finally, links between two unrelated web sites may confuse the user as to some association between both sites. Thus, the linked site could allege false endorsement if the link was never authorized. All these theoretical claims disregard the way the WWW, as a hypertext based medium, works.

230. See, e.g., *Stephano*, 485 N.Y.S.2d 220. But framing is just a way of linking or citing. A mere citation does not represent the content is associated with the citing party nor does it provide the content itself, beyond the implied license in linking.

screen will believe simply that Channel 5 will show, or is showing, or has shown, the marathon, not that Channel 5 has some special approval from the [trademark holder] to do so. In technical trademark jargon, the use of words for descriptive purposes is called a 'fair use,' and the law usually permits it even if the words themselves also constitute a trademark.²³¹

The courts then, must consider the nature of the web and the technological solutions available. This should limit legal actions for presumptive 'infringement' when the defendant could not know that she was on "private property" (a web site) because the plaintiff had failed to "build fences" (technological fixes), restraining access from unwanted links. It is in the interest of public policy that the legal system allow this kind of easement, of what otherwise would be an infringement of an undesired absolute property right,²³² that ultimately would deny the implied right to link.

3. Trivia Games on Celebrities as the On-line Version of Board Games

The web is big on games. One can find trivia, sometimes called encyclopedia, on any topic that one can think of. These are just a collection of questions and answers, usually set up as a database on-line to which one can submit her response. Within the entertainment genre, the most popular trivia are those about celebrities, soap operas, movies, and television shows. Just like fans' web sites, the majority of these trivia are unofficial sites built by fans, instead of the star, the studio, or the network.

These unofficial web sites, that use the name, persona, and gossip of celebrities, raise the right of publicity question. In the real world the obvious analogy for trivia games are board games about famous people.

231. *New Kids On The Block*, 971 F.2d at 307, citing *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 46 (1st Cir.1991).

232. 'The rules of the common law are continually changing and expanding with the progress of the society in which it prevails. It does not lag behind, but adapts itself to the conditions of the present so that the ends of justice may be reached.' . . . Specifically, this court has long recognized that the concept of 'property' is not static but changes to accommodate creative developments and novel legal relationships. (Citations omitted) *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal., 1979). (Suit was brought by the widow and surviving son of the movie actor Bela Lugosi, who played the title role in the 1930 film *Dracula*, seeking to recover profits made by defendant movie company in its licensing of the use of the Count Dracula character to commercial firms and to enjoin defendant from making any additional grants without plaintiffs' consent. The Supreme Court held that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime.)

The courts have refused to immunize the unpermitted use of the celebrity persona on games and posters from infringement of the right of publicity. The cases have held that this use is not immunized by the First Amendment. Basically, the argument is that the use of the name for the dissemination of news is proper, but the use of the same information, "for the purpose of capitalizing upon the name by using it in conjunction with a commercial product is not."²³³

But, books or magazines are also a 'commercial' product that one uses to distribute stories or gossip instead of selling them by loose paper. Society, as a whole, also capitalizes on books. If the game is written in book format, then it would escape infringement. Some commentators have argued that these cases are incorrectly decided because the courts were influenced, "by the untraditional conception of board games as media."²³⁴ However, the publicity value of the person is not used to attract attention to advertising, instead "the personalities become a part of the product sold."²³⁵ Games are also literary works and so they are given copyright protection. When the topic of the game is a celebrity, the game offers useful data on the life or achievements of the star. Trivia games, in this sense, are mostly didactic, as one learns at the same time one that is playing.²³⁶

233. *Palmer v. Schonhorn Enterprises Inc.*, 232 A.2d 458 (1967) (Action by well-known professional golfers seeking an injunction and damages with respect to use of their names by defendant corporation in conjunction with a part of a game. The Superior Court held that defendant corporation, which used names of plaintiffs in connection with golf game, should not be permitted to commercialize or exploit or capitalize upon such names or upon their reputation or accomplishments merely because such accomplishments had been highly publicized, and fact that plaintiffs' names were not advertised on lids of game box, so that purchaser would not know who the '23 famous golfers' were until he purchased and saw the contents, would not mean that plaintiffs' rights of privacy were not invaded. Judgment for plaintiffs).

See also *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (Injunction against a board game that used names of professional baseball players); *Rosemont Enter. Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (Supp. Ct. 1973) (Summary judgment for plaintiff Howard Hughes against the unpermitted use of his name and persona in the 'Howard Hughes' game).

234. *Sims*, *supra* note 190, at 494.

235. *Treece*, *supra* note 167, at 666.

236. Moreover, even if less common mediums of expression were to receive less First Amendment protection (perhaps out of concern for whether they contain any expression at all), trading cards do not fall into that category. Baseball cards have been an important means of informing the public about baseball players for over a century. 'Trading, collecting and learning about players are the most common reasons for children to purchase baseball cards. . . They are, in other words, an education in baseball.' . . 'In addition, non-sports trading cards have also been an important medium for disseminating information.' (Citations omitted).

Cardtoons, 95 F.3d at 969.

It is the position of this paper, along with these commentators, that courts are influenced by the traditional conceptions in a physical world of atoms where speech is regarded as words and speech products are just those carrying words. In this context, a board game, which is mainly picture-based, is regarded as a non-speech product. Pictures, because of their infrequent use as communication, have lagged behind as a proper means of speech (only in some fields like advertising where images were pervasive was it recognized that "a picture is worth a thousand words"). One main advance in the digital media has been to bring forward the use of graphics to communicate at the same level as word-based speech. The web allows not only advertisers or traditional mass media, but anyone, to fully communicate by words, images, and sounds. Influenced by traditional misconception, one may think of graphics as a non-speech format, and their use as blatant violations, while the same uses are permitted for word-based messages.²³⁷

Web games use graphics, sound, and video files, taking full advantage of the speech possibilities of a digital medium. So, what is the difference with a magazine that writes gossip about celebrities? They are both factual information that entertains. Also, most of the games on the web can be played for free. But, suppose that some of them started charging a minimal amount of cents per game ('e-cash'), what would be the commodity here? It is the position of this article that trivia, as much as magazines, just capitalize on their infotainment function.²³⁸

It is important to note that news gathering has been found to be a permissible use of the public persona. The case that involved the use, by a newspaper conducting a profit making survey over a 900 number, of the names of the members of the group New Kids on the Block without permission, shows a permissible use of the public persona. The court held that this use was not an infringement because it was related to news gathering, and not mere commercial exploitation.²³⁹ This decision has been considered to permit the profitable activity of newsrooms that exploit the identity of celebrities. One could argue that these databases on-

237. "[A]s to non political figures, board games and wall posters featuring these celebrities are not traditional media in which ideas are conveyed and should usually be viewed as more exploitative than informational or educational." MCCARTHY, *supra* note 81, at § 7.7[C] (Release # 16, 6/96).

238. "Cardtoons' trading cards, however, are not commercial speech—they do not merely advertise another unrelated product. Although the cards are sold in the marketplace, they are not transformed into commercial speech merely because they are sold for profit." *Cardtoons*, 95 F.3d at 970, quoting *Virginia State Bd. of Pharmacy*, 425 U.S. 748 (1976).

239. *New Kids On The Block*, 971 F.2d 302 (9th Cir. 1992).

line are just facts and news gathered by using the name of the celebrity with an entertainment purpose.

If games were considered speech products, protected by the First Amendment, the use of the name as a title for trivia games would be a permissible use,²⁴⁰ since the name has artistic relevance to the content of the game. It would not be considered to be a false designation under the Lanham Act, Section 43 (a), because the title is not explicitly misleading as to lack of connection with the game.

4. Advertising on the web

a) Advertising Web Sites, Newsgroups Or Other Speech Products

This section addresses the use of the celebrity, in advertising, for on-line content, such as web sites, newsgroups, bulletin boards, etc. The current forms of the advertisement can range from an ad in print media or a broadcasted commercial, to an on-line ad, like the banners used as part of most commercial web sites. The focus of this section is on the use of a celebrity's name or image to advertise a speech product about the celebrity as opposed to a collateral commercial product that would exploit the image of the celebrity to attract sales. This latter unauthorized use is analyzed in the next section. The analogy, for the purpose of the current section, is the use of the celebrity in advertisements for books, magazines, newspapers, movies, and any other kind of infotainment work.

The United States Supreme Court has held that advertisements, for First Amendment protected activities, are not considered commercial speech and thus they qualify for First Amendment protection.²⁴¹ Also, the California Supreme Court, has described the advertisement, for a constitutionally protected television docudrama, as a continuum of the film.²⁴²

240. "Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark." *Id.* at 307.

241. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

242. It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise. Since the use of Valentino's name and likeness in the film was not an actionable infringement of Valentino's right of publicity, the use of his identity in advertisements for the film is similarly not actionable.

Guglielmi, 603 P.2d at 462.

The same applies when the name and picture of the person, who is the subject of a biography, is used in advertising for that publication. It is exempt from the right of publicity:

Had defendants merely used plaintiff's name in the Advertisement, that use would clearly fall within the incidental use exception. . . The fact that the Advertisement also contained [plaintiff's] photograph, which defendants concede does not appear in the Book, cannot transform a privileged use in to an unlawful [one] because the goal of the Advertisement —to inform potential readers about the contents of the Book and induce them to purchase it— remains unchanged.²⁴³

This is not different from the AL web site.²⁴⁴ It started as an informational web site that incidentally offered the possibility of purchasing Dean's biography. The web site is analogous to the advertisement for a book that includes interesting facts or quotes from the biography, and perhaps a good photo of the star. More generally, web sites, set up for the sole purpose of selling a speech product, are not infringements of the right of publicity.

A New York Court, in *Stern v. Delphi*, held that because, "Stern's name was used by Delphi to elicit public debate on Stern's candidacy, logically the subsequent use of Stern's name and likeness in the advertisement is afforded the same protection as would be afforded a more traditional news disseminator engaged in the advertisement of a newsworthy product."²⁴⁵ This last decision is very important since it implies that bulletin boards, such as the one on Stern, are newsworthy.

In advertising for 'speech works,' liability could arise if the advertising untruthfully implies that the person actually endorses or approves of the publication. For example, if a fan called her web site the 'official Madonna site' when the star did not actually endorse the site, it could be deemed to be false advertising.²⁴⁶ But, this is independent of the use of

243. *Groden v. Random House Inc.*, 35 U.S.P.Q.2d 1547, 1550 (2d Cir. 1995) (Author brought action against publisher and second author alleging Lanham Act and state law claims based on advertisement for second author's book which incorporated plaintiff author's picture and quote from his book. Both books were about JFK's assassination — whether it was the work of a gunman or the result of a conspiracy. The Court of Appeals held that the use of plaintiff's name, picture, and quotation was permissible "incidental use" under state statute prohibiting use, for advertising or trade purposes, of name, portrait, or picture of any living person without that person's consent. Summary judgment for defendants affirmed by Court of Appeals.)

244. See *supra* notes 1 & 2.

245. *Delphi*, 626 N.Y.S.2d at 698.

246. *Cher v. Forum Intl. Ltd.*, 692 F.2d 634, 213 U.S.P.Q. 96 (9th Cir. 1982) (Celebrity brought action against free-lance writer who had conducted an interview with her and against

Madonna's picture as part of the ad for the web site. The use itself is legitimate as part of an informational product, and would not infringe upon Madonna's right of publicity.²⁴⁷

b) Ad Banners For Advertising of Collateral Products

Ad banners are pervasive on the web. The main source of revenue for commercial web sites²⁴⁸ comes precisely from ad space sold in top or bottom banners. The banner usually includes a graphic, sometimes animated, and a short phrase. It should grab the attention of the user who is expected to click on the ad which will link the user to the advertiser's web site. This is how marketing works on the web — not very different from the billboards on the street or the ads in a magazine. When an ad features a celebrity endorsing a product, this is when the right of publicity comes into play.

Under the current case law, the unpermitted use of human identity, in the commercial context of advertising or on commercial products themselves, triggers infringement of the right of publicity or invasion of the appropriation type of privacy. In most cases, liability will not contravene constitutional protection given to "commercial speech." The seller's right to disseminate information about the product remains safe, but she will have to pay the celebrity for the use of her image to drive

magazines which had published the interview. The Court of Appeals held that the writer who had made no promises of interviewee approval rights and who had not participated with the publishers could not be held liable; the celebrity was not damaged by one magazine's assertedly exaggerated claims of exclusivity; magazines were entitled to inform their readers that various issues contained articles about the celebrity; but the magazine appropriated the right of publicity by falsely indicating that celebrity had told it things that she would not tell a rival magazine and by falsely indicating that she endorsed the magazine.)

247. While the New Kids have a limited property right in their name, that right does not entitle them to control their fans' use of their own money. Where, as here, the use does not imply sponsorship or endorsement, the fact that it is carried on for profit and in competition with the trademark holder's business is beside the point. . . But the trademark laws do not give the New Kids the right to channel their fans' enthusiasm (and dollars) only into items licensed or authorized by them. (Citations omitted).

New Kids On The Block, 971 F.2d at 309.

248. "Advertising on the Internet has reached an estimated \$200 million on an annualized basis, and analysts said they see that figure growing as the industry matures." *Advertising: More Venues, Targeted Ads*, YAHOO NEWS, Mar. 14, 1997 (visited Mar. 4, 1997) <http://www.yahoo.com/headlines/970314/tech/stories/ads_1.html>. "Advertising on the Internet continues to record rapid growth, almost doubling every quarter. A report from the Internet Advertising Bureau says spending on various Web advertisements in the fourth quarter of 1996 hit a record \$109.5 million." *Advertisers Increase Web Buys*, YAHOO NEWS, Mar. 26, 1997 (visited Mar. 26, 1997) <http://www.yahoo.com/headlines/970326/tech/stories/ads_4.html>.

attention to her products. After all, the star's name will provide her with extra sales.

The problem comes with mixing uses such as news, fiction, and advertising. One approach to the problem is to consider which is the main message of the ad. If the main use is commercial, then it will infringe the right of publicity. Parody was tried as a defense by Samsung in Vanna White's case in the Ninth Circuit, but it was rejected.²⁴⁹ Samsung tried to build a humorous representation into an advertisement of VCRs.²⁵⁰ The court held that the parody was not relevant to the main content of the ad which was "buy Samsung VCRs."²⁵¹ This decision has been very polemic²⁵² and criticized by both the doctrine and later courts.

McCarthy calls attention to the celebrity's constitutional right not to be forced to speak or to permit one's property to be used as a vehicle for the political or social message of another.²⁵³ Then, advertisers, who claim the right to parody the celebrity as part of an advertisement, cannot force the celebrity to put her identity at the service of the advertiser.²⁵⁴ On the contrary, Madow points out that advertisements are the essence of pop culture and therefore, the right of publicity should not censor advertising when it is a mere parody, satire, or cartoon of a celebrity's likeness.²⁵⁵

249. *White*, 989 F.2d at 1512.

250. *Id.*

251. *Id.*

252. The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look. (emphasis added).

White, 989 F.2d at 1514.

253. MCCARTHY, *supra* note 81, § 8.11[B][2], at 8-84.

254. *See generally id.*

255. *See* dissent in *Vanna White*:

It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance. . . Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own. . . The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create. (Citations omitted).

The *Vanna White* case should not have the effect of preventing advertisers from employing certain marketing techniques that merely invoke the memory of a celebrity, such as his or her style of dress or common surroundings. The decision is likely to have some chilling effect on the speech of advertisers.

Recovery should be limited to instances in which an advertiser truly has misappropriated the identity of a celebrity by using his or her name or likeness to market a product. It is only then that an actionable appropriation has occurred. [A]dvertisers would need to consult a lawyer every time they used an element of popular culture in their advertisements, for fear of reminding the consumer of a particular person. This would stifle advertiser creativity and expression.²⁵⁶

5. Computer Simulations as "Look-alike" and "Sound-alike"

Have you heard the story of Kyoko, the first computer-generated pop star? This sixteen-year-old girl has released a series of successful singles in Japan and will be giving video concerts and appearing in commercials in the near future.²⁵⁷ This is what computer generated imaging can do. Kyoko is a star that has been created from scratch. But, the similar techniques used to build her could be employed to reproduce the body and voice of an existing celebrity. The result would be a 'look-alike' and 'sound-alike' digital persona. Will these fake avatars compete with the real celebrity? The technology is not here yet. The question is whether the protection that the law provides today, to performers, athletes, and other celebrities will also work on-line?²⁵⁸ When answering this question one should take into account the fair use and First Amendment exceptions which must be recognized and expanded to novel applications, such as on-line chatting, using stars' avatars, or 3-D environments.²⁵⁹

Id. at 1516-17.

256. Paul Cirino, *Advertisers, Celebrities, and Publicity Rights in New York and California*, 39 N.Y.L. SCH. L. REV 763, 798-99 (1994).

257. Richard Kadrey, *(Im) Material Girl*, WIRED 5.03, Mar. 1997 (visited March 27, 1997) <<http://www.wired.com/wired/5.03/eword.html>>.

258. See generally, Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101 (1993).

259. The new medium of multi-user virtual worlds allows ordinary Internet users to interact as 'avatars' in real time in shared 2 and 3D graphical spaces. Avatar virtual worlds are fast changing the notion of the net from 'interface' to 'place.' These worlds include vast 3D cityscapes reminiscent of the Metaverse in Stephenson's 'Snow Crash' to virtual bazaars full of traders in exotic objects to voice enabled worlds hosting avatar

On the Internet, these kind of sound-alikes and look-alikes are more likely to appear. Digital sound and image reproduction are within some keystrokes. One can set up her own web site, start manipulating pictures and sound files of famous people or their impersonators, and post them on-line. The right of publicity would not be infringed as long as these uses are not for the purpose of trade. A different issue is copyright infringement, which might occur with digital sampling or morphing real photos of the rich and famous.

On-line and CD-ROM entertainment provide new ways to exploit the celebrity's persona for commercial gains. The use of live talent adds value to these interactive products. For instance, CD-ROM games like John Madden's Football use real sports celebrities.²⁶⁰ Live persons can be used to create the digital double of the inaccessible star. Computer generated imagery (CGI) allows one to transform and manipulate a person's image, e.g., morphing somebody's face, transposing somebody's head on somebody else's body, and manipulating voices or sounds. Society is entering a new era of digital advertising, where these types of electronic imaging techniques will be more pervasive and thus the right of publicity will become more prevalent. The existing doctrine of 'look-alikes' and 'sound-alikes' is broad enough to deal with most of these on-line uses. This article will proceed by first describing the uses for commercial purposes that harm the star's image, and then will analyze the use for infotainment purposes which harm the performance value of the star more than her image.

The right of publicity can be infringed upon by unpermitted commercial use of such aspects of the persona as vocal style, instrumental sound style, and performing style. These uses are the so called "look-alikes" or "sound-alikes." An imitation of style, for advertising purposes, usually implies an active imitation, but it can also be a still picture, audio tape, or film of the celebrity or her impersonator. The imitation need not be human it can be an animated cartoon — remember the *White* case. The test for triggering the right of publicity is if the plaintiff celebrity is identifiable in the advertisement by imitation of her name, voice, mannerism,

glee clubs. Currently 350,000 users access virtual worlds using ordinary home computers with dial-up connections and no special hardware.

Bruce Damer, co-founder of Contact Consortium — a force to build community in Avatar Cyberspace. For an overview of the 'avatar' virtual world medium, see <<http://www.ccon.org>> & <<http://www.nmr.banffcentre.ab.ca/htmlprograms/mmi98/HTML/986mi19.htm>>.

260. Nancy Malitz, *Football forever: Snazzy video games and the Net keep fans sacking the quarterback all year*, DETROIT NEWS, Jan. 23, 1997, at D10.

or even accompanying objects.²⁶¹ The rationale used in those cases is exactly the same as those used for unauthorized advertising to endorse a collateral product. Basically, these uses can affect the plaintiff by over-exposing and projecting a different image than intended.

A picture alone can be enough to identify a person and thus constitute the unauthorized use of somebody's persona. Typically advertisers have tried ingenious ways of avoiding infringement of the right of publicity or privacy, without much success. These kinds of uses have been embodied under the 'look-alike' doctrine.²⁶² Traditionally, 'look-alikes' referred to the use of a model, identical to the celebrity, for advertising

261. In most cases an appropriation of identity is accomplished through the use of a person's name or likeness. . . In the absence of a narrower statutory definition, a number of cases have held that unauthorized use of other indicia of a person's identity can infringe upon the right of publicity. . . if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity. Whether the plaintiff is identified by the defendant's use is a question of fact. Relevant evidence includes the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.

RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION 46, cmt. d (1995). *See for example*, *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (Johnny Carson's right of publicity infringed by defendant's use of the phrase "Here's Johnny" in connection with the sale of portable toilets); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (Motschenbacher's identity misappropriated by defendant's use of plaintiff's distinctively decorated racing car in an advertisement); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) & *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (plaintiffs common law right of publicity was infringed by the use of a "sound-alike" to imitate the singers' voices in product commercials) & *White*, 984 F.2d 1512, (White's common law right of publicity infringed by the use of a robot that evoked White in her role as hostess of the Wheel of Fortune game show.) Professor Halpern notes that

there was no question in *Carson*, *Motschenbacher*, *Midler* or *Waits* that the defendant was blatantly attempting not merely to 'remind' recipients of the communication of the celebrity or vaguely to conjure up his or her image; the point of the activity was expressly to associate the individual's identity with the defendant's product as clearly as if a 'name' or 'likeness' had been used. . . 'the issue really is that of distinguishing appropriation of associate value from that from mere evocation.'

Halpern, *supra* note 176, at 863.

Identifiability should mean more than that the defendant's usage merely hints at the plaintiff or does no more than remind the viewer of the plaintiff. Thus, it should not be an infringement if advertiser merely uses a genre of character, even though it might remind some viewers of an actor that once played such a character. The law has yet to define clearly the line between infringing 'identification' on the one hand and noninfringing 'reminders' and 'hints' on the other hand.

See MCCARTHY, *supra* note 81, § 3.2.

262. *Onassis v. Christian Dior- New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (N.Y.Supp., 1984).

purposes without the permission of the celebrity.²⁶³ Nobody escapes from liability by using a model as a substitute for the original.²⁶⁴ Another 'look-alike' infringement, is the use of a star's picture that was taken years before.²⁶⁵ But, the courts have held that the person is entitled to recover whether her actual appearance has been altered through the passage of time.²⁶⁶ Also, *Playgirl* magazine tried to get around the 'look-alike' problem by using a Muhammed Ali illustration which fell somewhere in between picture and cartoon.²⁶⁷ The court recognized that the New York statute's reference to 'portrait or picture' encompasses any visual representation where the likeness of the celebrity is recognizable.²⁶⁸ The California statute defines broadly the term 'photograph' and requires that the person is 'readily identifiable' in the sense that one who views the picture, with the naked eye, can reasonably determine that the person depicted is the same as the one complaining.²⁶⁹ Plaintiffs, in addition to a right of publicity claim for unauthorized use in advertising, may allege false advertisement and general deception.

263. *Id.*

264. *Id.* (Jacqueline Kennedy-Onassis sued Christian Dior for using an Onassis look-alike in a commercial featuring other famous celebrities. The court interpreted the word "portrait" in the New York privacy statute to include a picture of another person designed to "convey the idea that it was the plaintiff." Despite the limited language of the statute, the court concluded that Onassis' "portrait" had been appropriated because the look-alike was a good impostor and the presence of other celebrities would foster a belief that Onassis actually appeared in the commercial.)

265. *See, Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D. N.Y. 1971).

266. *Id.* at 101 (Movie actress brought action against advertiser under New York statute for use of a person's name for advertising purposes without that person's consent. The District Court held that a nine-inch-high, full-length likeness of plaintiff, with features that were clear and characteristic, was recognizable despite the fact that the picture had been taken over 40 years previously, and the use of the picture was for "advertising purposes," even if the plaintiff's identity was irrelevant to what the advertisement was trying to sell, where the picture was not only used to catch the eye and focus it on the advertisement but plaintiff was depicted as actually recommending the product, the first four letters of which spelled the plaintiff's first name. Plaintiff's motion granted; defendant's cross motion denied.)

267. *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, (S.D.N.Y. 1978) (Action was brought by former heavyweight boxing champion for injunctive relief and damages in connection with allegedly unauthorized printing, publication and distribution of an objectionable portrait of the former champion in a magazine. On motion for preliminary injunction, the District Court held that: plaintiff had established probable success on merits for claimed violation of privacy under New York law; plaintiff would likely also prevail on his claim that his right of publicity had been violated by publication of offensive portrait; plaintiff made sufficient showing of irreparable injury, and preliminary injunction would extend to restrain publisher's activities with respect to all copies of magazines containing disputed portrait in England as well as New York. Preliminary injunction issued.)

268. *Id.* at 726-27.

269. CAL. CIV. CODE, § 334 (West 1998).

Even unauthorized use in the media has triggered liability. Esquire magazine reprinted the head of a photo of actor Cary Grant which was used in a previous issue of the same magazine, superimposed on a body of a model with an up-to-date outfit.²⁷⁰ The court disregarded the fact that it was an article on clothing trends, and found for plaintiff.²⁷¹ "The First Amendment does not absolve movie companies or publishers from the obligation of paying their help. They are entitled to photograph a newsworthy event but they are not entitled to convert unsuspecting citizens into unpaid professional actors."²⁷² Since the photo was published to attract attention to an article, unrelated to Grant, the identifiable star had a right to be paid for the commercial value of his modeling or acting services.

"Sound-alikes" are the equivalent of the "look-alikes" but, as the name indicates, refer to the use of celebrities' distinct vocal styles or instrumental sounds. However, courts have been more reluctant to recognize publicity rights on voice than publicity rights on likeness. Since the Bette Midler decision in 1988, the courts have upheld the right of a recording artist to assert infringement of the right of publicity for the unpermitted use of a 'sound-alike' imitator in a commercial advertisement.²⁷³ The same result was granted to singer Tom Waits for the use of a 'sound-alike' in a Frito-Lay commercial. Imitation of recorded vocal sounds may raise the question of federal copyright protection.²⁷⁴ However, the Ninth Circuit has held that there is no preemption since the right of publicity and copyright law protect different interests. "A voice is not copyrightable. What is put forward as protectable here is more

270. *Grant*, 367 F. Supp. at 877.

271. *Id.* at 878-79.

272. *Id.* at 878. (Plaintiff brought action against magazine publisher and clothing seller for libel, invasion of right to privacy and violation of right of publicity arising from use of photograph of plaintiff's head on torso of model in connection with magazine article dealing with clothing styles. The District Court held that the publication was not libelous but that the First Amendment did not preclude recovery under New York Civil Rights Law for use of plaintiff's photograph without compensation if photograph was used for purposes of advertising or for the purposes of trade.)

273. "[The] three elements of the Midler tort [are]: the deliberate misappropriation for commercial purposes of (1) a voice, that is (2) distinctive and (3) widely known." *Waits*, 978 F.2d at 1100.

274. With the advent of digital sampling, the infringement is made easier without even the need of a human impersonator. See Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against The Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723 (1987) (Arguing for the right of publicity as a protection for musicians against plagiarism of their works).

personal than any work of authorship. A voice is as distinctive and personal as a face. To impersonate her voice is to pirate her identity.”²⁷⁵

Apart from the advertising context, infringement of the right of publicity can also occur when using ‘look-alikes’ or ‘sound-alikes’ for alternative infotainment products that try to substitute the impersonator for the original. These kind of uses harm the performance value of a celebrity, rather than her image. For instance, ‘look-alikes’ comprise the use of an actor’s role or characterization that is closely identified with that star. If this use is for profit activities, then liability may arise. The obvious case is the use of a character that has been created from scratch by the celebrity as were the cases of Charlie Chaplin, the Marx Brothers, and the duo of Laurel and Hardy.²⁷⁶ Here it is clear that the actor is exclusively identified by the character. A less obvious case is when actors play a role or character that has been created by an author, usually as part of a written work. In such cases, it is the owner of the copyright, in the characterization, who owns commercial rights to the character or role, and the actor that plays the role usually does not have a publicity right over the character.²⁷⁷ The only exception is when the actor is perceived as being synonymous with the character, then the character is considered to be part of the persona as property of that actor. Thus, these cases become a mere question of fact as to the public identification of the celebrity.²⁷⁸ Characterizations may also be protected from com-

275. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462-63 (9th Cir. 1988).

276. I do not suggest that an actor can never retain a proprietary interest in a characterization. An original creation of a fictional figure played exclusively by its creator may well be protectable. (*Goldstein v. California* (1973) 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163.) Thus Groucho Marx just being Groucho Marx, with his mustache, cigar, slouch and leer, cannot be exploited by others. Red Skelton’s variety of self-devised roles would appear to be protectable, as would the unique personal creations of Abbott and Costello, Laurel and Hardy and others of that genre. Indeed the court in a case brought by the heirs of Stanley Laurel and Oliver Hardy (*Price v. Hal Roach Studios, Inc.* (S.D.N.Y.1975) 400 F.Supp. 836) observed at page 845: ‘we deal here with actors portraying themselves and developing their own characters. . .’ Here it is clear that Bela Lugosi did not portray himself and did not create Dracula, he merely acted out a popular role that had been garnished with the patina of age, as had innumerable other thespians over the decades.

Lugosi, 603 P.2d at 432.

277. *Id.* at 431.

278. While originality plays a role, a court should also consider the association with the real life actor. Where an actor’s screen persona becomes so associated with him that it becomes inseparable from the actor’s own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers using it without authority.

mercial exploitation through other legal doctrines such as service mark infringement, false advertising, or general "passing off."²⁷⁹

Computer animation permits the making of a movie or other entertainment work without real actors,²⁸⁰ by using their clone representations. This poses new spins on the right of publicity. While the right of publicity protects the commercial use of the persona in advertising contexts, the uncertainty rests more on the protection of the performance values of the celebrity. It should not be a difficult solution that the celebrity has to authorize a scanning of her body in order to be reproduced. Therefore, she would be compensated for this service. The problem comes with further uses of the computer generated image than those first intended by the celebrity. An instance of this is the *Pesina* case.

Mr. Pesina is a martial artist. The defendants are in various ways involved in the creation, manufacture, marketing, and distribution of home video games, *Mortal Kombat* and *Mortal Kombat II*, and related products. The Midway defendants created the games and hold their copyrights. There are coin-operated arcade and home versions of the games. In 1991, 1992, and 1993, Mr. Pesina was hired to model for characters of the coin-operated arcade *Mortal Kombat* and *Mortal Kombat II*. His movements were either videotaped or captured by a computer, and after an extensive editing process, incorporated into the games. The Midway defendants licensed Acclaim to sell the coin-operated arcade games in the home video market. Acclaim created the home version of *Mortal Kombat* and *Mortal Kombat II* by reformatting the coin-operated arcade software to render it compatible with media used in the home, the process being analogous to formatting a motion picture for VCR viewing. Acclaim also adopted *Mortal Kombat* and *Mortal Kombat II* for home use on the game systems designed by Nintendo and Sega, who, in turn, manufactured the games according to Acclaim's specifications.

McFarland v. Miller, 14 F.3d 912, 920 (3rd Cir. 1994) (the widow of actor George "Spanky" McFarland continued lawsuit against restaurant which had identical name to movie character played by actor.)

279. Service marks: *Apple Corps. Ltd. v. Adirondack Group*, 476 N.Y.S.2d 716 (1983); False advertising: *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985); Passing-off: *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970).

280. "Mr. Pesina was hired to model for characters of the coin-operated arcade *Mortal Kombat* and *Mortal Kombat II*. His movements were either videotaped or captured by a computer, and, after an extensive editing process, incorporated into the games." *Pesina v. Midway Mfg. Co.*, 948 F.Supp. 40, 42 (N.D.III, 1996).

In his complaint, Mr. Pesina alleges that all defendants used his persona, name, and likeness without authorization in the home version of *Mortal Kombat* and *Mortal Kombat II* and the related products, thereby infringing his common law right of publicity.²⁸¹

The court granted summary judgment on this count for the defendant because,

to prevail on this theory. . . Mr. Pesina would have to show that his identity became 'inextricably intertwined' in the public mind with [the character] Johnny Cage. This Mr. Pesina cannot do since the evidence shows that Mr. Pesina is not a widely known martial artist and the public does not even recognize him as a model for Johnny Cage.²⁸²

It is the position of this paper that this case was not correctly decided. The court analogized the use of Pesina's clone to the use of an actor's character in a different entertainment work. The difference is that the clone is Pesina himself. In this case his movements and his dimensions were all carefully imitated. As opposed to a character who adds some talented performance of value, Pesina was the skeleton of his cloned character. The clone is so much a part of his persona that the requirement of identifiability used for characterizations is meaningless here. The test should be different because Pesina should be entitled to authorize subsequent uses of his clone.²⁸³ The *Pesina* case should have been decided as if there had been a misappropriation of Pesina's voice or likeness. Then the holding would have supported the plaintiff's right of publicity on his persona.

Meanwhile, the best bet is that the Pesinas of the world can carefully retain their publicity right when drafting their contracts by limiting the use of their clones to the uses specified in the contract. There should be a comprehensive right of publicity that should protect all aspects intrinsic to a person's identity, including scanned body movements. In such way, a celebrity would control the use of her persona within her field of profession. Only educational, satiric, and incidental uses ought to escape infringement on the right of publicity.

This is the main threat that computer simulations pose to performers' rights, especially when these performers are not well-known. The current

281. *Id.* at 41-42.

282. *Id.* at 42-43.

283. Users who have played the game often commented about the fact that the game is based on real characters and looked upon the characters the same way most people look at movie stars, etc.

case law requires the identification element which is not easy to meet when the use involves not yet famous performers, or even worse, does not involve their faces, but instead involves other personal features of their personas, such as their bodies, movements, or what have you.²⁸⁴ The statutory and common right of publicity that claim to protect the public persona should include other aspects, that, although less recognizable than the name, voice, or likeness, do damage the performance value of would-be stars.

More traditional types of infringement in case law include imitations of performers by talented impersonators. An imitator trying to "pass off" as the original person is too obvious an exploitation and infringement to create any controversy. More common is the imitative performance of charismatic characterizations. Various bodies of the law (copyright law, misappropriation law, service mark infringement, false advertising, or general passing off) provide protection against this type of infringement.²⁸⁵

Sometimes the impersonation involves the imitation of a characterization with an impersonator, like in the Chaplin case, where the film was deceitfully distributed as "Charlie Aplin in the well-known character."²⁸⁶ This type of use could be more abundant on the Internet due to the ease of the distribution. Other times, characters are imitated in a different media than the original one. For instance, the *Lone Ranger* cases in-

284. "We hold only that there exists at least a triable issue of fact as to whether [plaintiff] McFarland had become so inextricably identified with spanky McFarland that McFarland's own identity would be invoked by the name spanky." This "inextricability identified" test has been used by later courts (*See DeClemente v. Columbia Pictures Indus., Inc.*, 860 F. Supp. 30, 52-53 (E.D.N.Y. 1994), *cited in* *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 42 (N.D.Ill. 1996)), adding to it the "widely known" requirement, present in the *Midler* test for voice appropriation. But as McCarthy points out "[t]o establish liability, plaintiff need prove no more than that he or she is reasonably identifiable in defendant's use to more than a de minimus number of persons. . . Rather, the number of people who in fact identified plaintiff goes to the extent of the remedy." MCCARTHY, *supra* note 81, § 3.4[B]. Otherwise, non-celebrities would never be afforded a right of publicity claim.

285. *See supra* note 279; Copyright Law — music sampling: *Jarvis v. A&M Records*, 827 F. Supp. 282 (D.N.J. 1993); Misappropriation law: *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1956).

286. *Chaplin v. Amador*, 93 Cal. App. 358 (1928) (The California Court of Appeals protected an actor's style and mannerisms with unfair competition law. Charles Amador appeared in movies under the name "Charles Aplin" and imitated Charlie Chaplin's famous character. Chaplin sued and received an injunction preventing Amador from making films that imitated Chaplin's movies, style of dress, costume, or mannerisms. The court explained that Chaplin's character enjoyed such immense fame that his identity was invoked by the character, even without reference to Chaplin by name. The court reasoned that Amador would deceive the public into believing Chaplin was the actor in the movie.)

volved the use of the radio series in public performances by copying the characteristic outfit and using the famous phrase, 'Hi ho, Silver.'²⁸⁷ Another case is the famous Beattlemania case in 1986, wherein the Superior Court, in Los Angeles, decided for the plaintiffs.²⁸⁸ The defendants had performed live for three years and filmed a movie. The imitation was so identical that the audience believed that they were watching the real Beatles.²⁸⁹

These cases have in common an unauthorized use for the purposes of competitive entertainment with the original. The amount of the taking is substantial enough so as to interfere with the livelihood of the original performer, as in *Zacchini*,²⁹⁰ thus this behavior is considered infringement upon the right of publicity. The rationale for protecting an original performance, from its imitation in other types of media, is the same as in copyright law, where adaptations are subject to authorization by the authors.²⁹¹ On the other hand, some argue that this kind of artistic achievement ought to be protected.²⁹² First, most people will still prefer the authentic Beatles. Second, competition and free-riding is allowed in every kind of business when it does not falsely associate the celebrity with some collateral good.

A different case occurs when the impersonator or imitator is used as comedic or satiric entertainment. As long as the performance consists of

287. *Lone Ranger, Inc. v. Currey*, 79 F.Supp. 190 (M.D. Pa., 1948) (Action by the Lone Ranger, Inc., against Earl W. Currey and Jack Smith for damages and injunctive relief because of defendants' alleged unfair competition, unfair trade practices, and infringement of plaintiff's good will, trade-mark, trade-name, and copyrights, wherein defendants counterclaimed. Judgment for plaintiff.)

288. *Apple Corp. Ltd. v. Leber*, 229 U.S.P.Q. 1015 (Super. Ct. CA 1986).

289. It's true that the mixed-media presentation was a top quality performance, organized, put together, and presented by some very highly talented and capable persons, but such only provided the setting for what was a fantasy concern by persons who so accurately imitated the Beettles in concert that the audience, according to contemporary viewers, in great part suspended their disbelief and fell prey to the illusion that they were actually viewing the Beettles in performance.

Apple Corp Ltd., 229 U.S.P.Q. at 1017.

290. *Zacchini*, 433 U.S. 562 (1977).

291. *Columbia Broadcasting Sys., Inc. v. Da Costa*, 377 F.2d 315, 319 (1st Cir. 1967) (Action against television network and others for misappropriating character and idea allegedly created by plaintiff. The Court of Appeals held that even if plaintiff, by appearing in public as character of early west and passing out cards which included the words 'Have Gun Will Travel', conceived and created idea and character which were novel, original, and unique, and plaintiff did not at any time abandon idea and character by a publication thereof, and defendants copied idea and character without permission of plaintiff and used them in television series, defendants were not liable to plaintiff for their alleged misappropriation of plaintiff's character, in absence of undertaking by plaintiff to have cards copyrighted.)

292. *Madow*, *supra* note 76.

a small takings, or a series of impressions, it will not trigger liability. It is generally accepted that a humorous mimic, in a non-advertisement context, does not infringe the right of publicity. These forms of entertainment are well protected by the First Amendment. Copyright law includes them as fair use since it does not chill the demand for the original, but usually does quite the opposite. As the California Supreme Court stated clearly in *Gugliemi v. Universal City Studios*, "The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather prominence invites creative comment."²⁹³

The right of publicity analysis is never complete without considering whether the presumptive uses fall under the First Amendment protected exceptions. The Internet brings about novel possibilities of communication, like MUDs or 3-D environments. Users can dispose of the face, body, or voices of stars for the purpose of interacting with others. The use of the computer generated image or voice in these new contexts do not harm publicity rights of the star. These are just private uses in communication or 3-D environments where people meet and talk, where there is no commercial use, but instead there is merely a communicative function, by using a particular avatar. These 3-D environments are now at their initial stages and are mainly for interacting with others for fun and for free. A few of these virtual places are for profit, like virtual Vegas for gambling.²⁹⁴ These for profit sites may be the first ones to stage unauthorized uses of celebrities' avatars. In the future, we will see that 3-D environments will become a true replica of our off-line world — resembling the Metaverse once described by sci-fi author Neal Stephenson.²⁹⁵ Then, new avenues for infringement of the right of publicity will arise, mirroring the off-line types of infringement.

Actors can work with programmers to create algorithms that simulate their appearance and character. Then, they can license this persona to whoever can pay for it, ranging from companies running interactive commercials, to on-line events and personal interaction, etc. This process also applies to totally artificial personas, people who are not around any more (Marilyn Monroe, James Dean, Confucious, etc.) or people who are considered to be mythological characters (Robin Hood, Genghis Khan, etc.).

293. 603 P.2d at 460.

294. See <<http://www.virtual.vegas.com>>.

295. See <<http://village.vossret.co.uk/p/paulf/snowcras.htm>> (a site devoted to Stephenson's book SNOW CRASH which includes what he titles a "Metaverse" of virtual reality in the future).

In the case of deceased actors, the post mortem right of publicity might be an obstacle for such uses. But, the weight of the interests being balanced should not be the same as during the celebrity's life. On the one hand, the First Amendment right of the public is generally reinforced, for the public interest in making comment or parody on deceased performances is even greater than during their lives. On the other hand, the damage to the performance values of a deceased performer is much less because there is no original whose livelihood is impaired. The right of the heirs to prevent these alternative performances should be more limited. In fact, these imitations would often renew the interest in the deceased figure which would increase the sales of the celebrities' works or memorabilia. Thus, these alternative performances should be protected from liability of post mortem publicity rights.²⁹⁶

Some commentators see these new technologies as a threat to the livelihood of film stars.²⁹⁷ This, however, is an alarmist view. The digital revolution is changing some of the traditional concepts and a very im-

296. The digital age is changing the meaning of time, space, speech and its value. Real time, global, multi-media and bits are the key words. As Negroponte suggests, the importance of the finished work diminishes as this work is immediately taken over into another work of art and so forth. NICHOLAS NEGROPONTE, *BEING DIGITAL* (1995). Then metaphysical questions need to be considered such as what's the value in time of a work of authorship, as it goes away from the source. Second, we should question the rationale for a 50 year average post-mortem period and what these post-mortem rights should protect.

Post mortem famous cases like the Elvis and the Marx brothers evidence the weakening strength of the right of publicity when the celebrity is not alive. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F. 2d 956 (6th Cir. 1980) (holding that under Tennessee law the right of publicity does not survive death), *cert. denied*, 499 U.S. 953 (1980). *Groucho Marx Prod, Inc. v. Groucho Marx*, 689 F. 2d 317. The Court affirmed the position that only acts unrelated to a celebrity's career should count as commercial exploitation, and further suggested that a survivable right would protect only "products and services that the celebrity promoted with his name and likeness during his lifetime."

In my opinion, postmortem rights should only apply to the advertising context or substantial use of original performances. Endorsement of products by using the persona of the celebrity ought to be always deemed infringement. There is no justification to associate the name of a deceased person with a product, for the only purpose of increasing its sales. However, incidental uses of the celebrity, as part of other performances or speech products, for building new works, commentary or for parody should be permitted. Then, for policy reasons there should be a post-mortem right on for-profit uses of the celebrity's persona limited to the first 20 years after the star's death. Just enough time to cover the first generation, not to foster a non-deserving ongoing right for far-related artist's heirs. This period should run parallel to copyright duration on the work so as not to create an obstacle for its use once the work is copyright free (in the public domain) but still under a post-mortem right of publicity. Then, the rights should go back to the public domain, for others to build upon them, except for advertisement purposes.

297. See Pamela Lynn Kunath, *Lights, Camera, Animate: The Right Of Publicity's Effect On Computer-Animated Celebrities*, 29 LOY. L.A.REV. 863 (1996) (Proposing a compulsory licensing scheme).

portant one is the value of information. Barlow describes this switch by listing some of the characteristics of digital information.²⁹⁸ One of them is that information loses value the further it goes from its source.²⁹⁹ This point helps to illustrate this article's proposition. First, computer simulation lacks the spark of life and it will take at least a decade to achieve almost perfect representations. Second, the avatar of Madonna will not compete with the real Madonna. Technology is also allowing real time interaction by real humans. The value in the future will be in real time performances, not only as we understand them today, but also as collective real time experiences where only those who can pay the admission ticket will have the privilege to enjoy a real time drama, comedy, or what have you. Hollywood will not disappear, it will just go interactive. Therefore, the solution is not to expand the legal blanket, but to walk hand in hand with technology, so that regulation is only provided 'a posteriori' when compelling private interests call for protection when weighed against 'a priori' higher interest like free speech.³⁰⁰ Instead, the courts should consider the original rationale of the right of publicity, to protect the 'fruit of the labor,' and the value of performers, who like Pesina, remain prey of the uncertainty of contract law.

C. Conclusion: Off-line Law Protects Fans On-line

The conclusion of this legal analysis is twofold. First, there is good news for all those fans around the world with their web page or newsgroup on a celebrity. They do not infringe upon the star's right of publicity. These infotainment uses of a celebrity's persona, without a tint of advertisement, are covered by the First Amendment right of the speakers. The Internet, as the quasi-perfect realization of the right to free speech, is mostly an ongoing conversation, where web sites, newsgroups, and the like, are no different than books, magazines, or chat. They are speech in a digital media and as such have to get their way in this open market place, with few permissible restrictions from the right of publicity. Only commercial advertising uses, 'look-alikes,' and 'sound-alikes,' which compete with the original, will trigger liability on-line the same way as they do off-line.

298. Barlow, *supra* note 71.

299. *Id.*

300. *White*, 989 F.2d at 1516. (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc) ("Instead of well -defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance.")

Second, the current legal structure itself will be valid on-line, but its application to the Internet will need to be carefully adjusted. If we want to apply current law to the legal issues on the Internet, not only to the right of publicity cases but, also to other regulations, it is critical that all engaged in this task understand the nature of the Internet, the way it works, and where it is going. Once this condition is fulfilled, society will be in a position to solve on-line legal issues by analogy to the existing case law. The trend started by some courts to extend the blanket of the right over the mere evocation of a celebrity through even surrounding objects is too far overreaching. The unsettled legal field on the Internet should not give way to more stringent laws that will have a chilling effect on this medium. Rather, the law has to be carefully adapted, respectful of technology, and with the rationale behind common law rights, like the right of publicity. Then, it should appear obvious that those performances by less well-known artists are the ones in need of legislative or judicial protection in the new medium.

Computer animation and reproduction of personal features like body shapes or movements, risk falling outside the traditional scope of the right of publicity. New media will force courts to re-think whether the personal attributes ought to be included within the protection of the right of publicity, rather than the surrounding objects, extrinsic to a person, that the *Vanna White* court included under an amorphous right of publicity. After all, the right of publicity aims at protecting and promoting the commercial value of one's identity, meaning personal attributes, but not limited to name, face, voice, or signature.

V. POLICY ANALYSIS OF THE RIGHT OF PUBLICITY

A. *The Internet Dilemma: Regulation or Deregulation?*

There is almost general agreement among cyberlawyers on the benefits of a delay in regulating the Internet. The justification is the nature of the medium. "When the primary articles of commerce in a society look so much like speech as to be indistinguishable from it, and when the traditional methods of protecting their ownership have become ineffectual, attempting to fix the problem with broader and more vigorous enforcement will inevitably threaten freedom of speech."³⁰¹ However, the fast pace of the evolving technology, may make it unnecessary to regulate certain aspects of the on-line medium.

301. Barlow, *supra* note 71.

The architecture of the Internet may serve, by itself, to achieve an order that in the real world requires legal imposition,³⁰² which may be a positive result given the high speed of technology advancement. Once there is a clearer sense of the conditions of cyberspace, ideally the law will come to ratify what is an accepted set of standards and social conducts. "When societies develop outside the law, they develop their unwritten codes, practices, and ethical systems. While technology may undo law, technology offers methods for restoring creative rights."³⁰³ Besides, the current problems on-line can generally be answered with the existing legal systems, making the need for new laws less imperative.

B. Interests in Play: Centralized v. Decentralized Meaning Making

Often, the justifications behind the right of publicity are not compelling, mainly when considering that not only celebrities' interests are at stake, but other social values, such as freedom of speech, are also at stake. Madow points out that the decision to recognize a property right in a celebrity's persona is basically a choice about the allocation of cultural 'meaning-making' power in contemporary society.³⁰⁴ This is a choice between a centralized, top-down management of popular culture or a decentralized, open, democratic cultural practice.

Throughout this article we have seen instances where the recognition of a right of publicity is justified to avoid an exploitation of the celebrity or a threat to her livelihood. In some other situations, like paraphernalia or post-mortem rights, it is not always clear what the justification for publicity rights is. It is in these second kinds of cases where the law should align itself with cultural pluralism and society's popular culture. Otherwise, the monopoly of the celebrity will remove symbolic elements from our cultural commons, which will prevent society from building on new cultural meanings and social icons. This need is more acute in a medium like the Internet which realizes, so clearly, the ideals of decentralized, open, democratic meaning-making.

302. For example, it may be unnecessary to constitutionally assure freedom of expression in an environment which, in the words of EFF co-founder John Gilmore, "treats censorship as a malfunction" and reroutes proscribed ideas around it. In our real world most nations have recognized in their constitutions a right to free speech and press, which has been later developed in more specific legislation or jurisprudence. This legal recognition is not that important in cyberspace. Attempts to censor on the Internet are quickly routed around thanks to the networked architecture of the Internet. Technology is sufficient by itself to warrant our freedom of speech in cyberspace.

303. Barlow, *supra* note 71.

304. Madow, *supra* note 76.

In the real world, there is a lack of adequate information about the extent to which publicity rights actually deter popular cultural practice. There is no question that the right of publicity makes possible the private censorship of popular meaning-making. It creates an opportunity for celebrities to suppress disfavored meanings and messages. Some of these suppressed meanings and messages may not find alternative means of expression. But, transparency is another virtue of the Internet, from sites reporting on the Internet actuality (good examples are YAHOO INTERNET LIFE, C/NET, WIRED), to the huge archive work made by Civil Liberty Organizations like ACLU, EFF, EPIC, etc.³⁰⁵ In EFF one can find legal cases or threatening letters sent to some usenet group, urging them to end their conversations and postings.³⁰⁶ Some evidence that the right of publicity is censoring the free expression of some celebrities' fans exists. Many of the fans, fearing a law suit, just pull down their on-line conference. This is suppressed speech that does not find an alternative means of expression. This type of legal abuse is what the right of publicity cannot serve. The unsettled legal arena, on the Internet, opens up the opportunity for individual interests, who try to gain terrain. This is what needs to be prevented.

C. Where The Courts Stand Right Now

The current trend, in the way in which the cases are being decided, and in particular, the *Vanna White* case, has been criticized for placing no limits on the type of factors that comprise the 'identity' in the common law right of publicity. "It is not important how the defendant has appropriated the plaintiff's identity. A rule which says the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."³⁰⁷

Strong criticism came from those who thought the decision curtailed the First Amendment. Some courts, after the *Vanna White* case, have still given the First Amendment its important weight when balancing against the Right of Publicity. In *Montana v. San Jose Mercury News, Inc.*,³⁰⁸ the

305. These sites can be found at <<http://www.aclu.org>>, <<http://www.eff.org>>, <<http://www.epic.org>>.

306. See for example, letter with reference to the 'Unauthorized Use Of Mighty Morphin Power Rangers Properties' (visited Dec. 3, 1996) <http://kragar.eff.org/pub/Legal/Cases/saban_perez_960603_legal_threat.letter>.

307. *White*, 971 F.2d at 1398.

308. 40 Cal. Repr. 2d 639, (Cal. App. 6 Dist. 1995), as modified (May 30, 1995), review denied (Aug. 17, 1995).

court denied football star Joe Montana's claim that a newspaper's use of his image, taken from its Super Bowl cover story, and sold in poster form, violated his right of publicity.³⁰⁹ The court held that the poster represented newsworthy events, and a newspaper has a constitutional right to promote itself by reproducing its news stories.³¹⁰ In *Cardtoons, LC v. Major League Baseball Player's Association*,³¹¹ a federal court, in Denver, exempted from the right of publicity, the production of trading cards parodying Major League baseball players and their millionaire contracts.³¹² In *Wendt v. Host International, Inc.*,³¹³ the District Court held that the robotic figures installed at airport bars around the world by licensees of the television show "Cheers" did not infringe the actors' right of publicity.³¹⁴

What can be inferred from these recent cases is that there is a need for the law to remain adaptable so that it may handle new ways of creative expression, and thus not be too overprotective and endanger the freedom to express ideas.

The *White* opinion, making actionable the evocation of a celebrity's identity in any form, is not the perfect solution for right-of publicity law, just by assuring that it can be applied effectively to misappropriation in unprecedented forms. The time may be ripe for the Supreme Court to take a second look at this issue, considering over 40 years have passed since *Haelan*, and almost 20 years since its first and only pronouncement on the subject.³¹⁵

D. Proposed Model of Legislation

From the legal analysis of this article, it appears that the existent legal doctrine of the right of publicity can solve most of the legal issues that the right might present on-line. This legal doctrine will work as well on-line but, as a matter of policy there is much that can be done to improve the current statutory and common law regulation.

From an administrative perspective, it would be ideal to have a federal statute on the right of publicity, comparable to trademark and copyright law. Such a law (often discussed but not yet implemented) might be

309. *Id.*

310. *Id.*

311. 95 F.3d 959 (10th Cir. 1996).

312. *Id.*

313. 50 F.3d. 18 (9th Cir., 1995). The USCA 9th has recently reversed and remanded the case for trial (*See Wendt v. Host International Inc.*, 125 F.3d 806 (9th Cir. 1997)).

314. *Wendt*, 125 F.3d 806.

315. Frackman & Bloomfield, *supra* note 125.

beneficial in that there is divergence on right-of-publicity issues among the numerous jurisdictions that recognize the right; e.g., what is and what is not protected, the differences under common law and statutory law, whether the right is descendible, and for how long. Moreover, with new-media technologies choice of law issues may become crucial as the exploitation of identity can occur easily and quickly at national levels in ambiguous jurisdictions (e.g., the Internet); a consensus on the law would promote certainty and reduce forum shopping. Of course, the federal statute would have to be drafted so that it is relevant in the face of technological advances and, at the same time, sensitive to free speech concerns.

This federal act should follow the Copyright Act in terms of time protection³¹⁶ and administration of licensing. It could do this through a common clearinghouse.³¹⁷ An entertainment attorney³¹⁸ warns of the high costs of securing rights from celebrities. Usually celebrities are represented by agents, which make negotiations more time consuming. But, celebrities tend to have busy schedules which, more often than not, delay production timing. The result is often a license that will be most favorable for the celebrity even if certain clauses are included that might try to commit the celebrity to certain schedules for delivery. This is the case for celebrities with lots of bargaining power, but not so for the less famous. It might be even more difficult to get a license in the latter case, leaving more unprotected the less known talent.

Most courts have determined that the right of publicity protects something different than copyright, and as such, is not subject to pre-emption by federal copyright law. Then, it may follow that there is an inability of the copyright owner to exercise her exclusive right to distribute. The copyright owner will not be able to sell the work unless she

316. Finally, with the passage of time, an individual's identity is woven into the fabric of history, as a heroic or obscure character of the past. In that sense, the events and measure of his life are in the public domain and are questionably placed in the control of a particular descendant. The fixing of the precise date for the termination of the right of publicity is inherently a policy decision, one that the Legislature may be best able to determine. However, in the absence of legislative action, a limit must be prescribed. In fashioning common law rights and remedies in the past, this court has often considered federal and state statutory schemes for guidance. . . Since the right of publicity recognizes an interest in intangible property similar in many respects to creations protected by copyright law. . . that body of law is instructive. (Citations omitted).

Lugosi, 603 P.2d at 446.

317. See Jonathan A. Franklin, *Article: Digital Image Reproduction, Distribution And Protection: Legal Remedies And Industrywide Alternatives*, 10 *COMPUTER & HIGH TECH. L.J.* 347 (1994) (Offering some alternatives to administration of copyright in the digital era.)

318. Raysman & Brown, *supra* note 133.

obtains the authorization from the celebrity. Similarly, creations which are no longer protected by copyright, are sometimes barred from entering the public domain, as Congress had intended. The right of publicity makes society wait longer to use those works that fall in the public domain. This delay hampers the creative process of society as a whole. Post-mortem rights should be revised in both cases, with a trend toward shortening the time of protection (twenty years maximum, should be enough to cover for the first generation).³¹⁹

A star should always be able to object to all commercial exploitation of her image, only those types of fair use and First Amendment protected uses should be left legally protected. Finally, extra protection may come as today from other legal bodies (Lanham Act, privacy statutes, common law rights) and even the aid of technology. For example, authorized endorsements by some celebrity could be easily recognizable by some sort of digital mark, so that the potential consumer just by clicking on the add, would see if the star actually recommends the product. The Internet allows us to adopt a lot of preventive measures through technological fixes which will eventually reduce the chances of infringement and also the need for further regulation.

VI. CONCLUSION

The history of the common law right of publicity is not a sound or consistent one. The traditional justifications for the right (moral rationale, economic rationale, or advertising deception) are not that plausible when prohibiting uses of the public persona in games, posters, or paraphernalia that communicate educational or symbolic speech. This speech is unduly restricted by the celebrity's monopoly on her public image.

In an on-line world, most uses of a celebrity's persona are covered by the First Amendment right of free speech. The Internet, as the quasi-perfect realization of the right to free speech, is just an ongoing conversation, where web sites, newsgroups, and the like, are no different than books, magazines, or chat. They are speech in a digital media and as such ought to get their way in this open market place, with few permissible restrictions from the right of publicity. After all, the free market of ideas constitutes the ground from which so many celebrities emerge. Only commercial advertising uses and 'look-alikes' or 'sound-alikes,' which compete with the original should trigger liability on-line the same way as they do off-line. The trend, though, started by some courts, is to extend

319. See *Zacchini*, 433 U.S. 562 (1977) (For a short discussion on post-mortem publicity rights.)

the blanket of the right over the mere evocation of the celebrity through surrounding objects, which is too far overreaching in its breadth. Rather, the perspective as to what the right of publicity aims at promoting must be kept, that is the commercial value of a person's identity.

The digital age does bring numerous avenues for expression to those performances by non or less well-known artists. These are the ones that lack the leverage of a strong negotiating power, when signing contracts, and thus, they are the ones that call for legislative or judicial protection, based on their right of publicity. Digital reproduction of an actor's movements, as intrinsic to a person as her face, will need to be covered by the right of publicity, in order to prevent the unauthorized 'recycling' through digital animation. The right of publicity upheld by the Supreme Court in *Zacchini*, should protect such performance values, which are intrinsic to a person's identity, rather than protecting surrounding objects, extrinsic to the human persona, which was done by the *Vanna White* Court when it generously characterized these surrounding objects as part of Vanna's right of publicity.

If one wants to apply the current law, including not only right of publicity but also other legal regulations, to the Internet, it is critical that all engaged in this task understand the nature of the Internet, the way it works, and where it is going to. Once this condition is fulfilled, one will be in a position to solve on-line legal issues by analogy to the existing case law. The current legal structure itself will be valid on-line but its application to the Internet will need to be carefully adjusted. One feature that makes the Internet different from off-line sources, is that it is guided by the growing case law now available and that the Net is currently the most enhanced way of communication now available. It is, no doubt, the best realization of the First Amendment.

The Internet is a medium that resents stringent laws that might have a chilling effect on the speech. Technological solutions are preferred, if available. A good instance of this is the use of the sometimes polemic links. These links are the key to the Infobahn. The link, as words, images, or sounds, not only conveys info, but is itself the endless path to more hyperlinked information. The message and the medium merge themselves into one. Links, as medium-message, work as the digital "traffic signs" that guide users on their net drive. But, in the information superhighway, there are other signs, like digital 'billboards,' which have a blatant commercial purpose, as opposed to the functional one of the links. No one has a property right to stop others from linking to one's web site, but one can set up technological barriers to prevent unwanted visitors. Analogies like this one will be relevant, for example, when dis-

cerning what constitutes commercial speech — the add banner — from what is just infotainment — mere links on a web page — in order to consider First Amendment or fair use protection. These characterizations of each application in cyberspace and their analogies to real world entities is where lawyers and the courts must not err. And unless there are more absurd lawsuits, more unsound court decisions that will impair the self-development of this medium should not occur.

The Internet, as a digital medium, is rich in technology-based mechanisms to correct dysfunction. Again, before looking to the legislator or the courts, users ought to look to web specialists who can offer more efficient and net-friendly solutions. These voluntarily adopted standards are what speeds up, improves, and enables the growth and increasing efficiency of the Net. These standards and technical measures are easily implemented regardless of boundaries, while laws are necessarily attached to some jurisdiction, and thus invalid outside those limits. Society should try to overcome the fear of the unknown which leads it to extreme measures, like extending the blanket of the law as a prophylactic measure. Once there is regulation, it is less permissible to step back in every legal system. Thus, more than any other field, technology calls for a break from the legislator to step aside until need is imperative.

This article will conclude by emphasizing the validity of the current laws on the Internet, including the right of publicity, but if and only if, those in charge of its practice fully understand the digital medium. Cyberlaw does not mean that a new set of rules are needed for cyberspace, rather it refers to this new set of premises, that one has to bear in mind when applying the existing laws to the Internet. The right of publicity protects both atoms and bits, analog and digital, subject to the same off-line limitations as society's constitutional free speech right.